131-405

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1888.

No. 267.

DAVID FREELAND, PLAINTIFF IN ERROR,

vs.

JOSEPH V. WILLIAMS.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA.

FILED MAY 8, 1886.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, AUGUST 4, 1888.

1 To the honorable judges of the Supreme Court of Appeals of the United States:

The petition of David Freeland, a citizen of the county of Preston and State of West Virginia, respectfully showeth that he is aggrieved by a final judgment of the supreme court of appeals of the State of West Virginia, rendered on the 5th day of July, 1884, refusing an appeal and writ of error to said court from a final judgment and decree of the circuit court of Preston county aforesaid, in a chancery cause in which Joseph V. Williams is plaintiff and your petitioner and others are defendants.

A certified copy of the record of said cause is herewith filed and made part of this petition.

The original suit and judgment of your petitioners, set forth in the record, belongs to a class of cases known as "war trespass suits" in West Virginia. During the war communities were divided into Union men and Secessionists, who often committed trespasses on each other unknown to the usages of civilized warfare. Secessionists often became pilots of raiding parties of Confederate forces, who took property of Union men without compensation, while their Confederate neighbors saved their property or were paid for the same in good money.

At the close of the war, and even before, the West Virginians who had thus piloted these foraging squads of Confederates on returning to their homes were sued in actions of trespass in the courts by Union men who had thus lost their property and judgments obtained by them against such raiders by due process of law. These judg-

2 ments were uniformly affirmed by the supreme court of appeals, the court of last resort, in the State of West Virginia from the year 1864 until the year 1873. These judgments thus affirmed by the highest court of the State remained in full force, unannulled, unreversed, and unsatisfied liens on the lands of the judgment defendants until in the year 1872 a constitutional convention called undertook to annul and vacate them. In the constitution framed by that convention and afterwards ratified by a vote of the people by a small majority was the following section, intended to render said judgments null and void:

"Section 35, article 8, of the const. West Virginia, 1872.—No citizen of this State who aided or participated in the late war between the Government of the United States and a part of the people thereof on either side shall be liable in any proceeding, civil or criminal; nor shall his property be seized or sold under final process issued upon judgments or decrees heretofore rendered, or otherwise, because of any act done according to the usages of civilized warfare in the prosecution of said war by either of the parties thereto. The Legislature shall provide, by general law, for giving full force and effect to this section by due process of law."

The journal of that constitutional convention shows that its prominent leaders and those who were active in securing the adoption of this section of the constitution were persons against whom judg-

ments of this class were then pending in full force and from which judgments then, "no due process of law," "no law of the
3 land," could relieve them. On the 24th day of March, 1873, the Legislature of West Virginia passed an act entitled "An act for giving full force and effect to section thirty-five of article eight of the constitution relative to citizens of the State of West Virginia who aided or participated in the late war between the Government of the United States and a part of the people thereof." See chapter 58, acts 1872 and '3.

As shown by the record, the original action was trespass, in which your petitioner, on the 22nd day of December, 1865, obtained a judgment by due process of law against the said Joseph V. Williams for the sum of $1,110, with interests and costs. Said trial was by a jury on the plea of not guilty. From said judgment said Williams took an appeal to the supreme court of appeals of the State of West Virginia, the highest court in that State in which a decision in said cause could be had, and that court, at the July term, 1867, affirmed said judgment. See pages 5 and 16 of the record and Williams *vs.* Freeland, 2 West Va. Reports, 306.

Afterwards, under the said act of the Legislature, chap. 58, acts 1873, the plaintiff, Joseph V. Williams, obtained an order from the circuit court of Preston county setting aside said judgment and granting him a new trial, but upon appeal from said action of the circuit court the supreme court of appeals of West Virginia declared said act of the Legislature, chap. 58, unconstitutional and void, and reversed the order of the circuit court setting aside said judgment and granting the plaintiff Williams a new trial. (See plain-
4 tiff's bill in the record, page 6, and case of Williams *vs.* Freeland, 19 West Virginia Reports, 599 and 600.)

But in the same case of Williams *vs.* Freeland, 19 West Va. Rep., the court goes on to declare judgments of the class referred to — be nullities by force of said section 35, article 8, of the constitution of West Virginia, but that said judgment should stand until by due process of law it was ascertained they were rendered nullities by said provision of the constitution, and the court went on further, suggesting a remedy by bill of injunction in all such cases. See Williams *vs.* Freeland, 19 West Virginia Rep., 599 and 600; Pierce *vs.* Ketzmiller, 19 West Virginia Rep.; White *vs.* Crump and Shanklin, 19 West Virginia Rep.

The plaintiff Williams, following the suggestions of the supreme court of West Virginia in said cases, filed his bill, as set forth in the record, to annul petitioner's said judgment of $1,110, and said Williams prayed for and relied for relief alone on the enforcement of the provisions of said section 35, article 8, of the const. of West Virginia. There is no pretence of any other grounds relied on or set up than said constitutional provisions.

Your petitioner made defence to plaintiff's bill by both demurrer and answer, as shown by the record, and insisted that said judgment was obtained by petitioner against the plaintiff, Joseph V. Williams, by due process of law; that petitioner's said judgment of $1,110 was the property of the petitioner of the value of $1,110; that said judg-

ment was and is a lien on the real estate of the said Williams, and that petitioner had a vested right of property in said judgment and its lien, and that said sec. 35, article 8, of the constitution of West Virginia, in annulling and destroying petitioner's said judgment, deprived him of his property and his vested right of property in said judgment without due process of law, and that, therefore, said section 35, article 8, of the constitution of West Virginia, is null and void, because it violates the 1st section of the 14 article, amendment of the Constitution of the United States. The Federal question thus fairly and distinctly raised by the pleadings in the case was decided by the court, and said section 35, article 8, of the constitution of West Virginia, by necessary legal intendment declared by the court to be not in conflict with the Federal Constitution in thus annulling and rendering invalid your petitioner's said judgment. From said final judgment and decree an appeal was duly prayed for by your petitioner to the supreme court of appeals of West Virginia, being the highest judicial tribunal and court of last resort of said State; but said appeal was disallowed and rejected by said supreme court of appeals in open court at its session held on the 5th day of July, 1884, in the city of Wheeling, as by the transcript of the record herewith exhibited will more fully appear.

Said judgment of the supreme court of appeals of West Virginia in refusing your petitioner his said appeal is in legal effect an affirmance of the final decree of the circuit court in said cause, and, so far as the action of the State courts of West Virginia is concerned, is final; and your petitioner has no remedy save by an appeal to this court, in pursuance to the provisions of law authorizing an appeal in such cases.

Your petitioner therefore prays an appeal may be allowed him and assigns the following errors in the judgment of the said supreme court of appeals of West Virginia affirming the final judgment and decree of the circuit court of Preston county, as follows:

First. The court erred in overruling petitioner's demurrer and his defence set up in his answer, because petitioner's said judgment of $1,110, recovered on the 22nd day of December, 1865, against said Williams, and affirmed by the supreme court of appeals of West Virginia on the 15th day of July, 1867, the court of highest and last resort in said State, then became and thereafter was a final judgment, obtained by due process of law, and all matters in controversy in said suit, both of law and fact, then became and thereafter were *res adjudicata* between petitioner and said plaintiff; and said judgment then became and thereafter was your petitioner's property, in which your petitioner had a vested right of property and good title thereto and the value thereof; and section 35, article 8, of the constitution of West Virginia, adopted after the rendition of said judgment and enforced as shown in the record, deprives your petitioner of his property and his vested right of property in said judgment without due process of law, and is therefore in conflict with and repugnant to section 1, article 14, amendment of the Constitution of the United States, and null and void.

Second. The court erred in overruling petitioner's demurrer and

answer because petitioner's said judgment, affirmed by the
7 supreme court of appeals of West Virginia on the 15th day of July, 1867, then became and thereafter was a contract between petitioner and said Joseph V. Williams within the meaning and protection of section 10, article 1, of the Constitution of the United States, and the enactment and enforcement thereafter of section 35, article 8, of the constitution of West Virginia, as shown by the record, impairs the obligation of that contract, and is therefore in violation of and repugnant to said section 10, article 1, of the Constitution of the United States, and therefore null and void.

Third. That the effect of the decision of the supreme court of appeals of West Virginia was to maintain that a constitutional convention has power to annul and destroy a final judgment, which no due process of law, no law of the land, could reverse, annul, or set aside; whereas, in point of fact, the plaintiff's right of property in such judgment is as fully protected by the 14th amendment of the Constitution of the United States as any other species of property.

For these reasons your petitioner prays that a writ of error may be allowed to him from the said judgment of the supreme court of appeals of West Virginia, and that said judgment may be reviewed and reversed, and that a citation in due form may issue.

DAVID FREELAND,
By J. T. HOKE, *His Attorney.*

8 WEST VIRGINIA, *To wit:*

At a supreme court of appeals held in Wheeling on the 5th day of July, 1884.

This day came David Freeland, by Berkshire & Sturgiss, Esq's, his attorneys, and presented a petition for a writ of error and supersedeas to a judgment of the circuit court of Preston county rendered on the 14th day of April, 1884, in a cause in which Joseph V. Williams was plaintiff and the said petitioner was defendant, with a transcript of the record of the judgment aforesaid accompanying the petition, and a certificate of counsel practicing in this court that, in their opinion, the judgment complained of ought to be reviewed, annexed thereto; which being seen and inspected by the court, the writ of error and supersedeas prayed for is refused.

The petition and transcript of record referred to in the foregoing order are in the words and figures following:

9 To the hon. judges of the supreme court of appeals of West Virginia:

The petition of David Freeland showeth that he is aggrieved by a final decree of the circuit court of Preston county rendered against him in the case of Joseph V. Williams *against him* at the April term, 1884.

A transcript of the record herewith filed will show the case to be substantially as follows: The plaintiff Williams filed his bill in said court against the petitioner praying an injunction against a certain judgment which the petitioner had theretofore obtained

against the plaintiff in said court, alleging that the said judgment was void, &c., and the circuit court, upon the hearing of the said cause, declared the said judgment to be void and of no effect. The petitioner therefore asks that an appeal and supersedeas may be allowed to the said decree, and assigns for error, first, that the court erred in overruling petitioner's demurrer to the plaintiff's said bill.

10 Second. In perpetuating the said injunction and declaring the petitioner's said judgment null and void.

Third. In decreeing costs against the petitioner.

Fourth. For other errors appearing on the face of the record.

DAVID FREELAND,
By his attorneys, BERKSHIRE & STURGIS.

We, Berkshire & Sturgis, attorneys practicing in the supreme court of appeals of West Virginia, do certify that in our opinion the decree above complained of ought to be reviewed by the said court.

BERKSHIRE & STURGIS,
Att. for Petitioner.

11 *Record.*

STATE OF WEST VIRGINIA:

In the Circuit Court of Preston County.

JOSEPH V. WILLIAMS *v.* DAVID FREELAND.

Injunction.

Be it remembered that at a day of said court, held in and for said county on the 15th day of Aug., 1883, came the plaintiff, by his counsel, and filed his bill herein, verified by his affidavit thereto appended; whereupon, on his motion, an injunction is awarded him in accordance with the prayer of his said bill, but this injunction is not to take effect until bond be given in the penalty of thirty-five hundred dollars, conditioned according to law; and thereupon this cause is sent to rules for further proceedings therein.

The plaintiff's bill aforesaid is in these words:

The bill of complaint of Joseph V. Williams, pl't'ff, against David Freeland, def'd't, filed in the circuit court of Preston county.

To the Hon. Wm. T. Ice, judge of the circuit court of Preston county:

12 The plaintiff complains and says that the def'd't instituted in the circuit court of said county his action of trespass against the pl't'ff and a certain Charles Williams, and on the 22d day of Dec., 1865, recovered a judgment therein against the pl't'ff alone for one thousand one hundred and ten dollars, with interest thereon from the 4th day of January, 1864, and for the costs of the pl't'ff therein expended. The record of said judgment has been destroyed by the burning of the court-house of said county. From

said judgment the plaintiff obtained a writ of error and supersedeas, and the said judgment was by the supreme court of appeals, at the July term thereof, in the year 1867, affirmed; and thereafter, on the — day of ——, 1875, the said def'd't sued out an execution on said sum of $——, with interest from the — day of ——, and for costs and damages as was in said case then provided for by law; that the pl't'ff then proceeded to invalidate & have said judgment set aside according to an act of the Legislature of the State of West Virginia, on the — day of ——, and said judgment was by the circuit count of said county, by order entered
13 in said proceedings, set aside and a new trial ordered in said original action; that from said order an appeal was taken by said Freeland and said order was reversed and said proceedings to set aside said judgment were dismissed, and so therefore the said original judgm't is apparently in force, although, in fact, void, for reasons hereinafter stated. The pl't'ff further states that said action in which said judgment was obtained was not an action *ex contractu*, but was an action *ex delicto;* that it was, in fact, for cattle or other personal property alleged by the def'd't to belong to him taken by the military authorities of the Confederate States and taken by the soldiery & military authorities aforesaid during the late war between the Government of the United States and a part of the people thereof; and the pl't'ff says that said judgment was for acts done according to the usages of civilized warfare in the prosecution of said war by the said Confederate States and the military power and authority thereof. The pl't'ff further states that during said war he was a citizen of the State of Virginia until the formation
14 of the State of West Virginia, and thereafter was and has been continuously since a citizen of the State of West Virginia and is now a citizen of the State of West Virginia; that he aided and participated in said war in the armies of the said Confederate States from the time he entered the service thereof, in the year 1862, until the termination thereof. The pl't'ff further states that he resides in the county of Grant and is the owner of real estate therein; that said judgment has been docketed in his said county, as he believes, and has occasioned a cloud upon his title to said property. The pl't'ff further says that he is advised that said judgment is void and that his property is not liable to be seized or sold therefor, and, notwithstanding said judgment is void, he is threat-ned and is in danger of having his property so seized and sold to satisfy said judgment, and the value and saleable character of his said real estate by reason of the cloud on the title thereof as aforesaid is greatly impaired. The pl't'ff further states that he has not full or adequate relief against said judgm't, except by this his bill and the due process of law thereby and by the enforce-
15 ment of the protection afforded by the 35th sec. of the 8th article of the constitution of this State in his behalf, and to have said judgm't by judicial authority declared void and inoperative. The pl't'ff therefore prays that said judgment be declared void; that the def'd't be perpetually enjoined and restrained from collecting the same and every part thereof, whether of principal, interests,

costs, or damages, and from suing out execution thereon, and that he may have such other relief as the court may see fit to grant.

JOSEPH V. WILLIAMS,
By Counsel.

JNO. BRANNON,
Pl't'ff's Counsel.

STATE OF WEST VIRGINIA, }
Preston County, } *To wit:*

Joseph V. Williams, the pl't'ff named in the foregoing bill, being duly sworn, says that the facts and allegations therein contained are true except so far as they are therein stated to be on information, and that so far as they are therein stated to be upon information he believes them to be true.

J. V. WILLIAMS, *Pl't'ff.*

Taken, sworn to, and subscribed before me this 15th day of August, 1883.

SMITH CRANE,
Cl'k of the Circuit Court of said County.

16 The pl't'ff's bond made and filed herein is in these words:

Know all men by these presents that we, Joseph V. Williams, Charles Williams, and John T. Peerce, are bound unto the State of West Virginia in the penalty of thirty-five hundred dollars; for the payment of which we bind ourselves, jointly and severally.

Witness our signatures and seals this 15th day of August, 1883.

Whereas the above-named Joseph V. Williams has obtained an injunction to a judgment rendered by the circuit court of Preston county on the 22d day of Dec'r, 1865, in favor of David Freeland, against the said Joseph V. Williams, for eleven hundred and ten dollars, with interest thereon from the 4th day of January, 1864, till payment, and costs, which said judgment was at the July term, 1867, of the supreme court of appeals of said State affirmed:

Now, if the said Joseph V. Williams shall pay the said judgment and all such costs as may be awarded against him, and also such damages as shall be incurred in case the injunction be dissolved, then the above obligation shall be void.

J. V. WILLIAMS. [SEAL.]
CHAS. WILLIAMS. [SEAL.]
JOHN T. PEERCE. [SEAL.]

17 Acknowledged before me and approved by me, in my office, this 15th day of Aug-st, 1883.

SMITH CRANE,
Cl'k of the said Circuit Court.

And at another day, to wit, at rules held for the said circuit court, in the clerk's office thereof, on the first Monday of September, 1883, on the motion of the pl't'ff, by his counsel, it is ordered that proper

process do issue herein, to be directed to the sheriff of this county, and made returnable here on the first Monday of October next, at which day, to wit, at rules held as aforesaid, on the first Monday of October, 1883, the summons awarded herein being returned executed on the def'd't, and he failing to appear and plead, answer, or demur to the pl't'ff's bill, on motion of the pl't'ff, by his counsel, it is ordered that it be entered on record that his bill will be taken for confessed as to the said def'd't if he shall continue in default; and at another day, to wit, at rules held as aforesaid, on the first Monday of November, 1883, the def'd't still failing to appear and plead, answer, or demur to the pl't'ff's bill, the same is taken for confessed as to
18 the said defend't, and, on motion of the pl't'ff, by his counsel, this cause is set for hearing as to the said def'd't; and at another day, to wit, at a circuit court held in and for the said county of Preston, on the 8th day of Dec'r, 1883, on motion of the pl't'ff, leave is given him to retake his own deposition upon proper notice to the def'd't.

Now, at this day, to wit, at a circuit court held as aforesaid, on the 14th day of April, 1884, came the parties, by their attorneys, and the def'd't filed his demurrer with cause therefor in writing to the bill of the pl't'ff, which, being argued, is overruled by the court, and thereupon the def'd't filed his answer to the bill of the pl't'ff, to which the pl't'ff replies generally; and this cause came on this day to be heard upon the bill of the pl't'ff, answer of def'd't, general replication thereto, depositions of witnesses, and was argued by counsel. Upon consideration whereof the court is of opinion, upon the pleadings and proofs, that the cause is for the pl't'ff. It is therefore considered by the court that the judgment in the bill mentioned in favor of the def'd't, against the pl't'ff, described as a judgment rendered by the circuit court of Preston county on the 22d day
19 of December, 1865, for one thousand one hundred and ten dollars, with interest thereon from the 4th day of January, 1864, and the costs, is void, and that the def'd't be perpetually enjoined and restrained from the enforcement and collection of the same and every part thereof, and that the def'd't do pay to the pl't'ff his costs herein.

The def'd't's demurrer to the pl't'ff's bill mentioned on the 8th page hereof is in these words:

DAVID FREELAND *ads.* JOSEPH V. WILLIAMS.

And the defendant, by protestation, not confessing all or any of the matters alleged in the pl't'ff's bill as they are therein set forth, doth demur thereto, and for cause of demurrer saith that the pl't'ff hath not therein shown such a case as entitles him to any relief in a court of equity as against this def'd't; that the 35th sec. of article 8 of the constitution of this State (now in force), on *the* which the pl't'ff founds his right to the relief prayed for, as well as the subsequent acts of the Legislature made in pursuance of it, is in conflict with the 10th sec. of the 1st article of the Constitution of the United
20 States, and also of the 1st sec. of the 14th article of the same, and null and void. Wherefore, and for divers other causes

of demurrer appearing on the face of said bill, the def'd't doth demur thereto, and prays the judgment of the court whether he shall be required to make further or other answer to said bill.

DAVID FREELAND,
By BERKSHIRE & STURGISS,
His Attorney-.

The def't's answer to the pl't'ff's bill, referred to on the 8th page hereof, is in these words:

The answer of David Freeland to the bill of complaint filed against him in said county by Joseph V. Williams.

To the Hon. Wm. T. Ice, judge of the circuit court of Preston county:

For answer thereto respondent, after reserving the benefit of all just exceptions and causes of demurrer to the said bill, answereth as follows: That the judgment sought to be annulled in this irregular and unconstitutional way was obtained as stated in the bill, and afterwards, upon appeal by the pl't'ff affirmed by the supreme court of appeals of West Virginia by due process of law, and became and was and is a final judgment and a vested right of and the property
21 of the def'd't; and he is advised and insists that neither the Legislature of the said State nor the people thereof, assembled in convention and exercising the legislative power of the State, had the power or right to set aside and annul the said judgment and take away and destroy his said vested right and property; and the def'd't saith that he is advised and insists that the said 35th sec. of the 8th article of the constitution of the said State conflicts with and violates the 10th sec. of the 1st article of the Constitution of the United States, and also the 1st sec. of the 14th article (amendment) of said Constitution, and is, therefore, null and void, as is also, for the same reason, the subsequent acts of the Legislature of the 22d of February, 1883, made in pursuance thereof; that the said judgment was for the value of a lot of cattle owned by the respondent, and taken and converted by the pl't'ff not in accordance with the usages of civilized warfare, and the said pl't'ff went to trial on the plea of "not guilty," the respondent having instituted an action of trespass for the recovery of the value of his said cattle, though he
22 might have waived the trespass and declared *ex contractu* in an action of assumpit; and the respondent further saith that he is advised that a court of equity has no jurisdiction in this case, and that the pl't'ff is not proceeding by "due process of law" to set aside and annul the said judgment, but is attempting to do so in violation of the laws of the land and of the Constitution of the United States, and by his own showing is not entitled to the relief prayed for in his bill. Respondent herewith files as a part of this answer a copy of the judgment of the supreme court of appeals of this State affirming the judgment of the circuit court referred to, marked No. 1. And, having fully answered, the respondent prays to be hence dismissed with his costs.

BERKSHIRE & STURGIS,
Attorneys for Def'd't.

The def'd't's exhibit, marked No. 1, above mentioned, is in these words:

WEST VIRGINIA, *To wit:*

At a supreme court of appeals held in the city of Wheeling on the 15th day of July, 1867, Joseph V. Williams, pl't'ff in error,
23 *vs.* David Freeland, defendant in error, upon a writ of supersedeas to a judgment of the circuit court of Preston county, rendered on the 22d day of Dec'r, 1865, in a cause wherein the defend't in error was plaintiff and the pl't'ff in error and Charles Williams were defendants.

This day come again the plaintiff in error, by Caleb Boggess, Esq., his attorney, and the defend't in error, by Messrs. Stanton & Allison, his attorneys; and the court, having maturely considered the transcript of the record of the judgment aforesaid and the argument of counsel made in this cause at the last term of this court, is of opinion there is no error in the judgment of the said circuit court in this cause; whereupon it is considered by the court that the judgment of the said circuit court, rendered on the 22d day of Dec'r, 1865, for eleven hundred and ten dollars, with interest thereon from the 4th day of January, 1864, and costs, be affirmed, with damages at the rate of six per centum per annum on the whole amount of the recovery, including interests and costs from the 9th day
24 of August, 1866, when the supersedeas took effect, until the decision of this court is entered in the order book of the court below, which damages shall be in satisfaction of all interest during that time.

And it is further ordered that the said defendant in error recover from the said plaintiff in error his costs in this court expended, which is ordered to be certified to the circuit court of Preston county.

A copy from the record.

Witness O. S. Long, clerk of our said supreme court of appeals, this 23d day of January, 1875.

O. S. LONG, *Clerk.*

The depositions referred to on the 8th page hereof are as follows:

Deposition of Joseph V. Williams, Taken Nov. 20, 1883.

Quest. 1. What is your name, age, and occupation and place of residence?

Ans. My name is Joseph V. Williams; I am 46 years old; I am a farmer, and reside in Grant county, West Va.

Quest. 2. Where did you reside before and during the war?

Ans. I resided in Hardy county, Virginia, now Grant county, West Va.

Quest. 3. Of what State were you a citizen before and during the war?

Ans. Virginia.

25 Quest. 4. Of what State have you been a citizen since the war and now?

Ans. I have been and — now a citizen of West Virginia. I have always lived in the same place.

Quest. 5. State whether you were a soldier during the late war between the Government of the United States and a part of the people thereof; and, if so, on which side.

Ans. I was a soldier in the Confederate army.

Ques. 6. What part of the Confederate army did you belong to?

Ans. I was a private in company "F," 7th Virginia cavalry.

Ques. 7. What part of the army were you with in January, 1864?

Ans. I was in my own command, with Gen'l Fitz. Lee.

Quest. 8. Do you know the defend't, David Freeland?

Ans. I do know him.

Quest. 9. State whether said Freeland after the war brought suit against you, for what the suit was brought, and in what court.

Ans. Freeland brought suit against me and Charles Wil-
26 liams in the circuit court of Preston county, W. Va. The suit was for cattle alleged to have been taken in what is now Grant county, W. Va., by Gen'l Fitz. Lee on a raid *on* through that county in Jan'y, 1864.

Quest. 10. State all you know about the taking of said cattle.

Ans. I was in that part of the country with my command at that time, and I know that the army took some cattle. The object of the raid was to get beef cattle. The order of the commanding officer was to take beef cattle and surplus horses. I believe that Freeland's cattle were taken at Medley at that time on that raid. I have had such information since that the cattle taken there were Freeland's cattle.

Quest. 11. For what purpose were the defendant's cattle taken, and what was done with them?

Ans. They were taken for the use of the Confederate army and driven off to the Valley of Virginia within the Confederate lines.

Ques. 12th. State whether you got any of these cattle for your own use or received any benefit from their being taken.

Ans. I did not.

27 Ques. 13. What was the result of the said suit against yourself and Charles Williams?

Ans. Judgment was obtained against me and dismissed as to Charles Williams; afterwards it was carried to the court of appeals and was affirmed.

Ques. 14. Is that the same judgment mentioned in the bill and proceedings in this cause?

—. ——.

And further deponent saith not.

J. V. WILLIAMS.

Deposition of Charles Williams, Taken November 20th, 1883.

Ques. 1. What is your name, age, occupation, and place of residence?

Ans. My name is Charles Williams. I am 64 years old. I am — farmer, and reside in Grant county, W. Va.

Ques. 2. Do you know the parties to this suit, J. V. Williams and David Freeland?

Ans. I do.

Ques. 3. How long have you known J. V. Williams, and where has he resided during that time?

Ans. I have known *his* all his life, and he has resided where he does now, in Grant county, W. Va., formerly Hardy county, Virginia.

Ques. 4. Of what State has the said J. V. Williams been a citizen?

28 Ans. Virginia, until the formation of West Virginia, and West Virginia since then.

Ques. 5. State whether he aided or participated in the late war between the Government of the United States and a part of the people thereof, on either side.

Ans. He was a soldier in the Confederate army.

Ques. 6. Where was the said J. V. Williams in January, 1864?

Ans. He was with Fitzhugh Lee's command at the time he made the raid through Grant county, in January, 1864.

Ques. 7. Where were you at that time?

Ans. I was at my home, in what is now Grant county.

Ques. 8. State anything you may know about any cattle of the defend't Freeland's being taken at the time.

Ans. I know that cattle were taken at that time by Fitz. Lee's command. I know that Freeland afterwards claimed, in a suit he brought, that his cattle were taken at that time.

Ques. 9. What orders were given about taking cattle by Gen'l Fitz. Lee?

Ans. He told me himself and I heard him give orders to the officers in command of the forces to take beef cattle and

29 surplus horses for the use of the Confederate army.

Ques. 10. You have spoken of a suit afterwards brought by the def'd't Freeland. Whom was that suit against, what was it brought for, in what court, and what was the result?

Ans. The suit was against Joseph V. Williams and myself, in the circuit court of Preston county; it was for cattle claimed to have been taken on the Fitz. Lee raid in January, 1864, in Grant county, formerly Hardy county; judgment against Joseph V. Williams and judgment in my favor upon the trial.

And further deponent saith not.

CHAS. WILLIAMS.

Deposition of Charles H. Vandiver, Taken November 20th, 1883.

Ques. 1. What is your name, age, occupation, and place of residence?

Ans. My name is Charles H. Vandiver. I am 43 years old. I am a journalist, and — Keyser, Mineral county, W. Va.

Ques. 2. Do you know the pl't'ff, Joseph V. Williams; if so, how long have you known him?

Ans. I have known said Williams from my earliest knowledge.

30 Ques. 3. Where has the said Williams resided since you have known him, and of what State has he been a citizen?

Ans. Near Williamsport, now Grant county, W. Va., formerly Hardy county, Virginia. He is a citizen of West Virginia since its formation; previous to that, Virginia.

Ques. 4. State whether the said Jos. V. Williams aided or participated in the late war between the Government of the United States and a part of the people thereof, on either side.

Ans. Jos. V. Williams was a private in company F, 7th reg't, Va. cavalry, Rosser's brigade, Confederate States army, of which I was lieutenant.

Ques. 5. State where your company was in January, 1864, at the time Gen'l Fitz. Lee raided through Grant, then Hardy, county.

Ans. My company was with Gen'l Fitz. Lee on that raid.

Ques. 6. Who was in command of that company on that raid?

Ans. 1st Lieut. James T. Parker.

Ques. 7. Was Jos. V. Williams with the company on that raid?

Ans. He was.

31 Ques. 8. What do you know about any cattle being taken in Grant county in that raid?

Ans. There were a good many cattle taken by order of Gen'l Fitz. Lee for the use of the Confederate army.

Ques. 9. In what way did the pl't'ff, Jos. V. Williams participate in the taking of any cattle at that time?

Ans. As a private soldier acting under the orders of his superior officer.

Ques. 10. Did he take or assist in taking any cattle in any other way?

Ans. He did not, except as detailed and directed to take them.

Ques. 11. What do you know of the cattle of the def'd't, David Freeland, having been taken at that time?

Ans. I know some cattle were taken from the farm of Mr. Babb, near Medley, in Grant county, on that raid; whose they were I did not know at the time; subsequently learned that they belonged to David Freeland.

Ques. 12. Who took these cattle, and what was done with them?

Ans. Gen'l Fitz. Lee ordered them taken, which was done by soldiers detailed for the purpose from his command. They

32 were driven south within the *the* Confederate lines for the use of the Confederate army.

And further this deponent saith not.

C. H. VANDIVER.

Deposition of Joseph V. Williams Taken January 18th, 1884.

NOTE.—Inasmuch as this deposition is excepted to, it is deemed proper to copy it in full, including notice.

JOSEPH V. WILLIAMS *v.* DAVID FREELAND.

Deposition of a witness taken before Orlando Shay, a commissioner of the circuit court of Mineral county, West Virginia, on Friday, the 18th day of January, 1884, between the hours of sunrise and sunset of said day, at the office of the said Orlando Shay, near the court-house, in Keyser, county of Mineral, State of West Virginia, which when taken will — offered as evidence on behalf of Joseph V. Williams upon the trial of a cause now pending in the circuit court of Preston county, in pursuance of a notice a copy of which is hereunto annexed.

Present: Jos. V. Williams and Charles E. Vandiver, his attorney.

33 First came JOS. V. WILLIAMS, a witness of lawful age, who, being first duly sworn deposes and says:

Ques. 1. In your former deposition taken in this cause you stated, in answer to a question propounded to you, that in the suit of David Freeland against you and Charles Williams *that* judgment was obtained against you, and that it was dismissed as to Charles Williams; and then the following question was propounded to you: "Is that the same judgment mentioned in the bill and proceedings in this cause?"

—. I did answer that question. I can now and so answer and say that the judgment mentioned in the bill of said cause is the same judgment that was recovered by David Freeland against me in the suit, referred to in my former deposition, of David Freeland against myself and Charles Williams; and the judgment in said suit was against me alone, and no judgment was obtained against Charles Williams.

And further this deponent saith not.

J. V. WILLIAMS.

STATE OF WEST VIRGINIA, } *To wit:*
Mineral County, }

34 I, Orlando Shay, a commissioner of the circuit court of said county, do certify that the foregoing deposition, to be offered as evidence on behalf of Joseph V. Williams upon the trial of a cause now pending in the circuit court of Preston county, West Virginia, was taken before me at the time and place mentioned in the caption hereof and in pursuance of the notice hereunto annexed.

Given under my hand this 18 day of January, 1884.

ORLANDO SHAY,
Com'r Circuit Court M. C.

Notice.

To David Freeland:

Take notice that on Friday, the 18th day of January, 1884, between the hours of sunrise and sunset of said day, at the office of Orlando Shay, near the court-house, in Keyser, county of Mineral, State of West Virginia, I will proceed to take the deposition- of myself and other witnesses, which when taken will be offered as evidence in my behalf upon the trial of a cause now pending in the circuit court of Preston county, West Virginia, upon the chancery side thereof, wherein I am plaintiff and you are defendant; and if from any cause said deposition shall not be taken on said
35 day, or if commenced shall not be finished, then the same will be continued, from time to time, between the same hours and at the same place until fully completed.

Yours, &c., JOSEPH V. WILLIAMS,
By Counsel.

Sheriff's Return.

On the 8th day of January, 1884, I delivered an office copy hereof to David Freeland in person.

WM. M. SCHAFFER, *D. S.*,
For E. THOMAS, *S. P. C.*

Exceptions.

The within deposition is excepted to for want of notice and because not taken in this cause.

BERKSHIRE & STURGISS,
Att. for Def'd't.

STATE OF WEST VIRGINIA, *County of Preston,* } *ss:*

I, the undersigned, clerk of the circuit court of said county, do certify that the foregoing contains a full and complete transcript of the record of the said cause of Joseph V. Williams *vs.* David Freeland.

June 3d, 1884.

Teste: SMITH CRANE, *Cl'k.*

Clerk's fee for transcript	$4 78
Postage	42
	$5 20

36 I, O. S. Long, clerk of the supreme court of appeals of West Virginia, hereby certify that the foregoing is a true and complete transcript of proceedings had in said supreme court of appeals in the case of Joseph V. Williams, plaintiff below, defendant in error, *vs.* David Freeland, defendant below, plaintiff in error, as fully as the same remains in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of our said supreme court of appeals this 12th day of August, 1884, and in the 22nd year of the State.

[Seal Supreme Court of Appeals, West Virginia.]

O. S. LONG.

37 Know all men by these presents that we, David Freeland, John P. Jones, and John M. Freeland, are held and firmly bound unto Joseph V. Williams in the full and just sum of two hundred and fifty dollars, to be paid to the said Joseph V. Williams, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this twenty-eighth day of October, in the year of our Lord one thousand eight hundred and eighty-five.

Whereas lately at a supreme court of appeals of the State — West Virginia, in a suit depending in said court between Joseph V. Williams, plaintiff, and David Freeland, defendant, a judgment was rendered against the said David Freeland, and the said David Freeland having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said Joseph V. Williams, citing and admonishing him to be and appear at a Supreme Court of the United States to he holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such that if the said David Freeland shall prosecute said writ of error to effect and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

DAVID his x mark. FREELAND. [SEAL.]
JNO. P. JONES. [SEAL.]
JOHN M. FREELAND. [SEAL.]

Sealed and delivered in presence of—

GEO. W. BROWN.
J. MARUM.
JNO. W. DECK.

Approved by—

JOHN W. MASON,
U. S. Commissioner, Circuit Court, Dist. of West Virginia.

Approved Nov. 11th, 1885.

M. R. WAITE,
Chief Justice U. S.

38 UNITED STATES OF AMERICA,
District of West Virginia:

I, John W. Mason, a United States commissioner for the district of West Virginia, do certify that David Freeland, John P. Jones, and John M. Freeland, whose names are signed to the bond hereto attached, bearing date October 8th, 1885, this day personally appeared before me in my said district, and, each by me being first duly sworn, says that he is worth more than five hundred dollars ($500) after paying all his indebtedness, including what he is liable for surety for others and deducting all exemptions allowed by law; and each one of them further says that he owns in his own right real estate unincumbered, in the county of Preston, State of West Virginia, of greater value than $500.

Given under my hand this 2nd day of November, 1885.

JOHN W. MASON,
U. S. Com'r.

39 UNITED STATES OF AMERICA,
District of West Virginia:

I, John W. Mason, a United States commissioner for the district of West Virginia, do certify that David Freeland, John P. Jones, and John M. Freeland, whose names are signed to the bond hereto attached, dated the 28th day of October, 1885, this day personally appeared before me in my said district, and each acknowledged the said bond to be his act and deed.

Given under my hand, in my said district, this 2nd day of November, 1885.

JOHN W. MASON,
U. S. Com'r.

40 The United States of America to Joseph V. Williams, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of appeals of the State of West Virginia, wherein David Freeland is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this eleventh day of November, in the year of our Lord one thousand eight hundred and eighty-five.

M. R. WAITE,
Chief Justice U. S.

41 On this 16th day of April, in the year of our Lord one thousand eight hundred and eighty-six, personally appeared

Robert Lamon, sheriff of Berkeley Co., before me, the subscriber, a United States commissioner for the district of West Virginia, and makes oath that he delivered a true copy of the within citation to Joseph V. Williams, in the county of Berkeley.

ROB'T LAMON, *S. B. C.*

Sworn to and subscribed the sixteenth day of April, A. D. 1886.

D. C. WESTENBAUER,
U. S. Commissioner.

Executed the within process by serving a true copy thereof and delivering the same to Joseph V. Williams in person at Martinsburg, in the county of Berkeley, State of West Virginia, this 16th day of April, 1886.

ROB'T LAMON,
Sheriff of Berkeley County, W. Va.

42 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the honorable the judges of the supreme court of appeals of the State of West Virginia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of appeals before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Joseph V. Williams, plaintiff, and David Freeland, defendant, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or
43 statute of or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said David Freeland, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein

to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the eleventh day of November, in the year of our Lord one thousand eight hundred and eighty-five.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—

M. R. WAITE,
Chief Justice U. S.

Nov. 11, 1885.

44 A copy of the within writ was lodged in my office on the 1st day of April, 1886.

O. S. LONG,
Clerk of the Supreme Court of Appeals of West Virginia.

Endorsed on cover: West Virginia supreme court of appeals. No. 267. David Freeland, plaintiff in error, *vs.* Joseph V. Williams. Filed May 8, 1886.

Supreme Court of the United States.

OCTOBER TERM, 1888.

No. 267.

DAVID FREELAND, Plaintiff in Error,

vs.

JOSEPH V. WILLIAMS.

In Error to the Supreme Court of Appeals of the State of West Virginia.

BRIEF FOR PLAINTIFF IN ERROR

C. C. COLE,
W. L. COLE,
Attorneys.

LAW REPORTER PRINT, 503 E ST.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1888.

DAVID FREELAND, *Plaintiff in Error.*
vs.
JOSEPH V. WILLIAMS.
No. 267.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA.

Statement of the Case.

The plaintiff in error obtained a judgment against the defendant on the 22d day of December, 1865, in the Circuit Court of Preston County, West Virginia, for $1,110 with interest and costs. From said judgment the defendant obtained a writ of error, upon the hearing whereof the Supreme Court of Appeals of said State affirmed the judgment. (See Williams *vs.* Freeland, 2 W. Va. Reports, 306.) The action was trespass to recover the value of cattle taken by the defendant from the plaintiff during the War of the Rebellion. This judgment remains unsatisfied. In 1872 a constitutional convention framed a new constitution for the State of West Virginia, which was ratified by popular vote on the 22d of August, 1872.

The 35th section of the 8th Article of that instrument provides as follows:

"No citizen of this State who aided or participated in the late war between the Government of the United States and

a part of the people thereof, on either side, shall be liable in any proceeding civil or criminal; nor shall his property be seized or sold under final process, issued upon judgments heretofore rendered, or otherwise, because of any act done according to the usage of civilized warfare, in the prosecution of said war by either of the parties thereto. The legislature shall provide by general law for giving full force and effect to this section by due process of law."

At the first session of the Legislature under this new Constitution an act was passed designed to carry the above quoted section of the constitution into effect. It provided, among other things, that the Court which rendered any such judgment should set it aside and grant a new trial upon the petition of the person against whom it was rendered, if it was made to appear that such judgment was rendered by reason of an act done by the defendant according to the usages of civilized warfare.

A petition was filed by the defendant to set aside the judgment in this case, and the Circuit Court, upon said petition, set the judgment aside and ordered a new trial. The Supreme Court of Appeals, however, reversed this decision, holding the act of the Legislature to be unconstitutional. In its opinion the proceedings provided for by the act was not "due process of law." The Court intimated that no legislation was necessary to carry the constitutional provision into effect, and that the proper mode of redress was by bill in equity.

See Williams *vs.* Freeland, 19 W. Va. Reports, 599.

Thereupon the defendant filed his bill in equity in the court where the judgment was rendered alleging that the judgment was recovered "for acts done according to the usages of civilized warfare in the prosecution of the war by the said Confederate States, and the military power and authority thereof." It is charged that the judgment is void by reason of the 35th Section of the 8th Article of the Con-

stitution above quoted, but that it constitutes a cloud upon the title to the complainant's real estate, and prays that it may be declared void by the Court, and the plaintiff perpetually enjoined from its collection.

There was a demurrer and answer to the bill, and the complainant took testimony tending to prove that, when he committed the acts for which said judgment was rendered, he was a soldier in the Confederate Army and acting under the direction of officers in command thereof.

Upon hearing the case the Circuit Court made a decree, on the 14th of April, 1884, declaring the judgment void, and perpetually enjoining the enforcement thereof.

On the 5th day of July, 1884, the plaintiff in error in this Court, who was sole defendant in said suit in equity, presented his petition to the Supreme Court of Appeals of West Virginia, according to the laws of the State and the rules of practice of said Court, praying an appeal from the decree aforesaid and the appeal was refused. See Record, pages 4 and 5.

Whereupon a writ of error was granted by the late Chief Justice of this Court to review the judgment of said Supreme Court of Appeals.

Assignment of Error.

The Supreme Court of Appeals of the State of West Virginia erred in refusing to allow the appeal prayed for, and to review and reverse the decree of the Circuit Court of Preston County, for the following reasons, to wit:

First. Because the plaintiff's judgment of $1,110, recovered on the 22d day of December, 1865, and affirmed by the Supreme Court of Appeals on the 15th day of July, 1867, became and was a final judgment which could not legally be reviewed, reversed, or annulled by the legislative authority of said State.

Second. Because said judgment, being for property of the

plaintiff taken by the defendant and converted to his use, was, at least from the date of said judgment, a contract which, by virtue of Section 10, Article 1, of the Constitution of the United States, the State had no authority to impair.

Third. Because said judgment was the property of the plaintiff of which he could only be deprived by due process of law, and neither Section 35, Article 8, of the West Virginia Constitution, nor the suit in equity which was grounded solely upon said constitutional provision, constitutod such "due process of law" as is contemplated by the first section of the Fourteenth Amendment of the Constitution of the United States.

Law Points.

It does not appear from this record what matters of law or fact were involved in the trial of the original case. It is not alleged in the bill, nor does it anywhere appear in the record, that the matters of fact alleged in the bill were not fully tried by the Court and jury at the original hearing. This Court cannot know what the ruling of the State Court was in this case upon the question of belligerent rights except what may be inferred from the cases decided by the Supreme Court of the State appearing in the reported decisions of that Court.

See Hedges *vs.* Price, 2 W. Va., 192.
Williams *vs.* Freeland, Id., 306.
Lively *vs.* Ballard, Id., 496.

The plaintiff's judgment was recovered in the due course of legal proceedings in a court whose jurisdiction both of the parties and subject-matter has never been questioned, and after a full and fair trial.

The judgment, in this case, affirmed by the highest Court in the State, must be held conclusive of all matters of law and fact involved, and binding upon the parties thereto, not-

withstanding some other court or tribunal may conceive that it erred in its application of the law.

Cooley's Cons. Lim, 409.

Although this Court may be of opinion that there was error in that judgment, it has no authority to review it.

Delmas *vs.* Ins. Co., 14 Wall., 661.

The Constitution of West Virginia in force at the time this judgment was rendered and affirmed provides that "no fact tried by a jury shall be otherwise re-examined in any case than according to the rules of the common law."

Const. 1863, Article 2, Section 7.

And the Constitution of 1872 contains the same provision.

Const. 1872, Article 3, Section 13.

One of the fundamental provisions of the Constitution of 1872, as well as that of 1863, is that "the legislative, executive and judicial departments shall be separate and distinct, so that neither shall exercise the powers belonging to either of the others."

Const. 1863, Article 1, Section 4.

Const. 1872, Article 5, Section 1.

But the constitutional convention of 1872, which ordained the independence and defined the powers of each of the three departments, in its zeal to destroy judgments of this class, itself usurped the judicial function, and the Supreme Court of West Virginia has sustained its action.

The plaintiff's redress must therefore be found, if any he has, in this Court, by virtue of the protecting ægis of the Federal Constitution.

The 35th Section of the 8th Article of the Constitution of 1872, in effect provides that the plaintiff's judgment in this case shall never be enforced if it was rendered, because of any act done according to the usage of civilized warfare,

in the prosecution of the late war of the rebellion. The constitutional convention, not content to declare what the law should thenceforth be in such cases, proceeds to reverse the decision of the Courts in cases already tried and finally determined.

In this it is respectfully submitted that two provisions of the Constitution of the United States are violated, viz: (1.) That no State shall pass any law impairing the obligation of contracts. (2) That a State shall not deprive any person of life, liberty, or property, without due process of law.

Cons. U. S., Art. 1, Sec. 10, and the Fourteenth Amendment, Section 1.

Is the Plaintiff's Judgment a Contract?

This Court has held, in Louisiana *vs.* Mayor of New Orleans, 109 U. S., 285, that the term "contract," as used in the Constitution, signifies the agreement of two or more minds for considerations proceeding from one to the other, and therefore that a judgment against a municipal corporation for damages caused by a mob is not protected by that provision of the Constitution which prohibits a State from passing a law impairing the obligation of a contract.

The judgment in the case now under consideration, while rendered in an action of trespass, was for the value of cattle taken from the plaintiff by the defendant. See pages 6 and 11 of the record. The verdict of the jury established the fact that the defendant took the cattle, and the law implies a contract to pay their value. The plaintiff might have waived the tort and sued in *assumpsit* on the implied contract.

The question now is whether a judgment upon an implied contract is not a "contract" within the meaning of the Constitution. This question was not involved in *Louisiana vs. New Orleans,* because not presented by the facts in the case.

In its more extensive sense contract includes every description of agreement or obligation, whereby one party becomes bound to another to pay a sum of money or to do or omit to do a certain act. It is an act which contains a perfect obligation. (1 Pow. Contr., 6.) An express contract is one where the terms of the agreement are openly uttered and avowed at the time of making. (2 Bl. Com., 443.) Implied contracts are such as reason and justice dictate, and which, therefore, the law presumes every man undertakes to perform. (2 Black., Com., 443.) When the defendant took the plaintiff's property the law implied a promise on his part to pay the plaintiff the market value thereof. The implied contract became express and absolute by the judgment of the Court.

A very large class of legal obligations have their origin in implied contracts and the mischief which the Constitution sought to guard against in this particular would be but half accomplished by restricting the meaning of "contract" as used in the section in question to express contracts.

The word has been held to include a grant of corporate franchise. (Dartmouth College Case, 4 Wheat.) A grant of land by a State to individuals, executed as well as executory. (Fletcher *vs.* Peck, 6 Cranch.) And compacts between States. (Green *vs.* Biddle, 8 Wheat.) And in Garrison *vs.* New York, 21 Wall., at page 203, it is clearly indicated that a judgment founded upon an implied contract is within the meaning of this constitutional provision.

It would seem to accomplish the purpose of the framers of the Constitution to construe the word contract, as here used, to include all species of contracts implied as well as express—all contracts upon which an action *ex contractu* could be maintained at common law.

The judgment in question was the property of the plaintiff of which he could not be deprived but by due process of law.

Judgments for money are property which may be bought, sold and transferred the same as notes, stocks, bonds, and mortgages.

2 Black. Com. Ch. 29, Sec. 1, 2, 3.

The cause of action, whether *ex contractu* or *ex delicto*, is merged in the judgment. Both parties and privies are equally estopped by the judgment on the tort as on the contract.

Kelly *vs.* Arnold, 4 W. Va., 646.

The recovery of the value of a chattel by judgment divests the plaintiff's title and transfers it to the defendant, though the judgment be not satisfied, and bars him from asserting his title in any other action. If the title to the plaintiff's property thus vests in the defendant, an equivalent title to property of equal value must vest in the plaintiff, which is his judgment for damages.

By statute law of West Virginia a judgment for money is a lien upon all the real estate of the debtor within the State.

Code of W. Va., 1868, Ch. 139, Sec. 5.

The plaintiff's judgment was, therefore, a vested right of property.

Gunn *vs.* Barry, 15 Wall., 622.

"Vested rights," says Judge Cooley, "is not used in any narrow or technical sense, or as importing a power of legal control merely, but rather as implying a vested interest which it is right and equitable that the government should

recognise and protect, and of which the individual could not be deprived arbitrarily without injustice."

Cooley's Cons. Lim., 357-8.

So is a right of action property whether it springs from contract or from the principles of the common law.

Cooley's Cons. Lim., 362.
Dash *vs.* Van Kleek, 7 John., 477.
Westervelt *vs.* Gregg, 12 N. Y., 211.
Kendall *vs.* Dodge, 3 Vt., 360.

The Court of Appeals of West Virginia had no doubt about the plaintiff's judgment being property within the meaning of the Fourteenth Amendment of the Federal Constitution.

See Pierce *vs.* Kitzmiller, 19 W. Va., at page 579.

But that Court was of opinion that a suit in equity to annul the judgment under the 35th Section of Article 8 of the State Constitution was due process of law.

Was the suit in equity, grounded solely upon the constitutional provision, "due process of law?"

It will be observed that the suit to set aside the plaintiff's judgment was not based upon any ground of general equity jurisdiction. It was grounded solely upon the constitutional enactment. The bill alleges, in the language of the Constitution, that the "judgment was for acts done according to the usages of civilized warfare." The one thing deemed necessary to avoid the judgment was to show that it was rendered for some act which, in the prosecution of the late war, was done in accordance with the usages of civilized warfare. Every judgment rendered by the courts of the State, no matter upon what issues tried, is opened to

this constitutional test, and every one of them may be reviewed and re-tried upon this question. If this question may be opened and re-tried, why may not any other question which was settled by the judgment be also opened and re-tried? The constitutional convention did not agree with the courts as to the rules of law in this class of cases, therefore, it authorized a re-trial of the cases as to the point of supposed error, and commanded the Court to reverse its judgment—that is, forbade the enforcement of it, which the Court in this case construes to mean that the judgment shall be declared void.

It is, therefore, the legislative act which has deprived the plaintiff of his property in the judgment in this case, and not the suit in equity. The Court was only pronouncing the judgment of the constitutional convention. The fact that the plaintiff in error was brought in by subpœna in chancery to hear the pre-ordained judgment pronounced against him cannot be deemed "due process of law."

Judge Cooley says:

> When the Government through its established agencies interferes with the title to one's property, or with his independent enjoyment of it, and its action is called in question as not in accordance with the law of the land, we are to test its validity by those principles of civil liberty and constitutional protection which have became established in our system of laws, and not generally by rules that pertain to forms of proceedure merely.
>
> * * * * * * * *
>
> Due process of law in each particular case means, such an exertion of the powers of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribed for the class of cases to which the one in question belongs.
>
> Cooley's Cons. Lim., 356.

And this Court has said, in Bank of Columbia *vs.* Okely, 4 Wheat., 235:

"As to the words from Magna Charter incorporated in the Constitution of Maryland, after volumes spoken and written with a view to their exposition, the good sense of mankind has at length settled down to this, that they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice."

And again in Murray's Lessee *vs.* Hoboken Land Co., 18 How., 272, it is said: "It is manifest that it was not left to the legislative power to enact any process which might be devised. *The article is a restraint on the legislative as well as on the executive and judicial powers of the Government, and cannot be so construed as to leave Congress free to make any process 'due process of law' by its mere will.*"

A statute which makes an order of the President a sufficient defense for an act personally done is void.

Johnson *vs.* Jones, 44 Ill., 142.

Nor can Congress impair the right to use a patented invention by an extension of the term of the patent.

Bloomer *vs.* McQuewan, 14 How., 539.

Nor declare an absolute forfeiture of land for the nonpayment of taxes without any process.

Martin *vs.* Snowden, 18 Gratt (Va.), 100.

It has no power to organize a board of revision to nullify confirmed titles.

Reichart *vs.* Phelps, 6 Wall., 160.

An act of Congress cannot have the effect to annul the judgment of a Court already rendered as respects adjudications upon private rights of parties.

State of Pa. *vs.* Wheeling Bridge Co., 18 How., 421.

See also—

Attkinson *vs.* Dunlap, 50 Me., 111.

Burch *vs.* Newbury, 10 N. Y., 394.

Lawson *vs.* Jeffrees, 47 Miss., 686 (12 Am. R., 342).
Westervelt *vs.* Gregg, 12 N. Y., 202, 211.

The State cannot prevent by constitutional provision the enforcement of a judgment theretofore obtained.

Delmas *vs.* Ins. Co., 14 Wall., 661.

A constitutional convention has no more power in this regard than a legislature.

White *vs.* Hart, 13 Wall., 645.
Gunn *vs.* Barry, 15 Wall., 610.
Railroad Co. *vs.* McClure, 10 Wall., 511.

If the constitutional convention could prevent the judgment in this case from being enforced upon the ground that it was for an act done according to the usages of civilized warfare, then it could prevent the enforcement of any judgment rendered by the courts of the State, except judgments founded in contract. It could as well have declared that no judgment should be enforced if it should be made to appear that it was rendered for an act of negligence, or for libel, or malicious prosecution. The question is not one of expedience, but of power. If the power is admitted, then the legislature is the sole judge of the extent of its use.

It is respectfully submitted that no such usurpation of the judicial function should be recognized as "due process of law."

C. C. Cole,
W. L. Cole,
Attorneys for Plaintiff in Error.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

DAVID FREELAND, *Plaintiff in Error.*

AGAINST

JOSEPH V. WILLIAMS, *Defendant in Error.*

FROM THE

SUPREME COURT

—OF—

WEST VIRGINIA.

ROBERT WHITE, *for the Defendant in Error.*

IN THE

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DAVID FREELAND, } *Plaintiff in Error.*
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FROM THE

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—OF—

WEST VIRGINIA.

ROBERT WHITE, *for the defendant in error.*

The counsel for the plaintiff in error has gone far away from the record, in his attempt to prejudice the defendant, by the statements made in his petition, substantially charging the defendant with piloting raiding squads of Confederates in the commission of "trespasses unknown to the usages of civilized warfare."

The simple history of this case is easily gathered from the records, to which the Court can refer.

In June 1864 the plaintiff instituted against the defendant, in the circuit court of the county of Preston, an action of trespass *de bonis asportatis*, to recover damages for the taking of some cattle, by a command of confederate soldiers, acting under the orders of Generel Fitzhugh Lee, then a General Officer in the armies of the Confederacy; At that time the defendant was a private soldier in company "F", 7th Virginia Cavalry, acting under the command of its said Officer; The cattle were taken for the use of the armies of the Confederate States by the command aforesaid, but it does not appear that the defendant had anything to do, personally, with the taking; He was with the army at the time some of the soldiers, acting under orders, took them.

After the war ended, in December 1865, the defendant attempted to file pleas in the said action, commonly known as "pleas of belligerent rights"; His pleas were refused and rejected by the courts of West Virginia, and he was compelled to go to trial, upon a plea of not guilty, before a jury composed alone of men who were "persons of known loyalty to the State of West Virginia and to the United States, who had not borne arms against the United States, nor given aid counsel, encouragement or countenance to persons engaged in armed hostility to the government of the United States" &c. In other words each juror had to have the qualifications required by that "Test oath", which this Court held to be unconstitutional in the case of *Pierce vs. Carskadon*, 16 Wal., 239.

See Acts of West Virginia Legislature, 1863, Ch. 93, page 109, Sec. 5 for the jury law in force at the time of the trial of said action at law.

The then Court of Appeals of the State fully sustained the court below, deciding in this case, as it had decided in cases theretofore, that the defences of "billigerent rights" could not be relied upon by the defendant.

Freeland vs. Williams, 2 W. Va., 308.

Hedges vs. Price, 2 W. Va., 182.

On the 22nd day of August, 1872, the peple of West Virginia adopted a new Constitution, containing as its Sec. 35 of Article 8, the following language: "No citizen of this State, who aided or participated in the late war between the government of the United States, and a part of the people thereof, on either side, shall be liable in any proceeding, civil or criminal; nor shall his property be seized or sold under final process issued upon judgments or decrees heretofore rendered or otherwise because of any act done according to the usages of civilized warfare in the prosecution of said war by either of the parties thereto. The Legislature shall provide by general law, for giving full force and effect to this section by due process of law."

When the people thus expressed their will, it was hoped that all such litigation, as this, would cease, and that once again we might have somewhat of "peace on earth and good will to man"; But Alas the plaintiffs in these "War trespass cases", as they were known, seem detirmined still to enforce their so called judgments, against the will of the people of the State, if, per chance, this last appeal to this Honorable court may aid them.

After said amendment of the Constitution of the State was adopted the Legislature, on the 24th day of March 1873, passed an act providing for a proceeding by petition to have these "trespass judgments" set aside and new trials granted; by reference to the case of *Peerce vs. Kitzmiller*, 19, W. Va., page 582, the Court may find the provisions of that Act of the Legislature.

Under that Act of the Legislature, Williams filed his petition in the Circuit Court of Preston county, asking that the judgment in this case might be set aside, because the act for which the judgment was rendered was "done according to the usages of civilized warfare." And that Court finding the fact to be so, set aside the said judgment, as authorized to do, by the said Act of the Legislature. The Court of Appeals of the State reversed that judgment upon the ground that there was no authority in the said amendment to the State

Constitution for setting aside said judgment in the manner provided for by said Act of the Legislature, and that therefore the judgment of the lower Court was "without due process of law," as required by the Constitutional provision itself.

See *Freeland vs. Williams* 19 W. Va., 601. *Peerce vs. Kitzmiller* 19 W. Va., 581, &c. *White vs. Crump*, &c. 19 W. Va., 583.

The Court of Appeals of the State having thus held that the defendants in such cases could not get relief by way of the statute aforesaid; Williams filed his bill of injunction, appearing in the record of this cause, The Court below, being the Circuit Court of said county of Preston, perpetuated the said injunction. Freeland applied to the Court of Appeals of the State for an appeal from the order of the Circuit Court, by which the said injunction was perpetuated, but the Court of Appeals refused to grant such appeal, and from that order the cause came into this Court. This is the history, subtantially of this case.

The former home of the defendant, Williams, who was then a soldier as shown, was in the present county of Grant, then Hardy county. The original suit was instituted against him in the county of Preston, under and by virtue of an Act of the Legislature. passed February 10, 1864, which authorized suits which might be brought in the counties of Hampshire, Hardy or Pendleton, to be brought in said county of Preston. That suit was instituted in 1864, and judgment rendered in 1865, during the war. See *United States vs. Anderson*, 9 Wall, 56. The suit was brought by one belligerent in the court of his own county against an enemy, and for an act of war permitted by the laws of civilized warfare. The defense of "belligerent rights" should have fully protected the defendant.

Dow vs. Johnson, 100 U. S., 169.

Coleman vs. Tennessee, 97 U. S., 509.

Ford vs. Surget, 97 U. S., 594, 96 U. S. 176.

Hal. Int. Law page 343, section 23; page 332, section 9-10, page 347, section 29-20; page 306, section 24; page 398, section 27; page 389, section 10. *Vat. Law Nations*, chapter 12, section 190-1.

The Courts of the State, in such a case, had not the jurisdiction to render the judgment which was rendered, and which was sustained by the then Court of Appeals. Those Courts disregarded the defendant's plain rights, and refused to hear his just defence, *at law*. Under such a state of facts, without even considering any other question involved, would not a court of Equity, the especial province of which is to give remedy when the law will not, entertain the bill of injunction in this case and perpetuate it?

Johnson, Judge, in the case of *Ogden vs. Saunders* 12, Wheat page 291, uses this language: It is equally the duty and right of governments to impose limits to the avarice and tyranny of individuals, so as to not suffer oppression to be exercised under the semblance of right and justice."

Equity can interfere if there is accident, inadvertance-mistake, fraud, newly discovered testimony, or abuse of process at law, without the intervention of a statute to help it.

See in this connection *Chesnut vs. Shane*, 16 Ohio 599.

Webster vs. Hade, 52 Pa. St. 480,

State vs. Newark, 3 Dutch. 197.

The testimony taken in this case, clearly shows that the original judgment was rendered for acts done "according to the usages of civilized warfare in the prosecution of said war," and this is not denied by the petitioner in his petition. If this is true, then the said judgment is and should be treated as void, in all Courts, by reason of the Constitutional pro-

vision passed by the people of West Virginia, herein before quoted, unless that provision is repugnant to some provision of the Constitution of the United States. I take it as a well settled rule of this Court that it will adopt such construction of a State law or State constitution as may have been given it by the highest tribunal of the State, and will not attempt to interfere with or reverse the construction of such State tribunal, unless there is some question of national autohirty involved.

Cooley's Cons. Lim. 4th, Ed. pages 15-16.

N. O Water Works vs. *La Sugar Co.*, 125, U. S. 29.

Church vs. *Kelsey* 121 U. S. 284.

The highest tribunal of the State of West Vriginia, has decided in this very case that the said provision of the State Constitution operates "*ex proprio vigore*," and that therefore this judgment is a nullity.

Williams vs. Freeland, 19 W. Va. 601.

In the case of Peerce vs. Kitzmiller, 19 W. Va. 281, the Court of Appeals say through its President Judge, "I have no doubt that the session operates *ex proprio vigore*, and that there is in the Court ample power to give full force and effect to the provision without any legislation whatever."

I therefore take it for granted that this Court will not interfere with the State Court in this case, or upon this subject, unless it should believe that the said provision of the State Constitution is repugnant to the Constitution of the United States.

Is the provision of the State Constitution, referred to, repugnant to the Constitution of the United States?

It is claimed *by the petitioner*, that the said provision of the State Constitution is repugnant to:

1. Clause 3, section 10, article 1, of the Constitution of the United States, which provides that no State shall pass any "law impairing the obligation of contracts."

2. To that part of section 1, of the 14th amendment to the Constitution, which provides "Nor shall any State deprive any person of life, liberty or property, without due process of law."

I might here insist that the Courts of West Virginia, which refused the defendant the right to file in this case, his plea of "belligerent rights," violated the spirit if not the letter of the same amendment of the Constitution wherein it is provided that a State should not "deny to any person within its jurisdiction the equal protection of the laws" especially when he was forced to submit his cause, without the benefit of his just defence, to a jury selected under the provisions of the then Jury law of the State. I simply, in passing, invite the attention of the Court to this thought.

1st. Then does the provision of the State Constitution impair the obligation of a contract?

The judgment in this case was rendered in an action of trespass for an alleged *tort*. Is that judgment a contract?

The term "contract," as used in the Constitution, signifies "the agreement of two or more minds for considerations proceeding from one to the other, to do or not to do certain acts."

Louisiana vs. Mayor of New Orleans, 109 U. S. 286.

Garrison vs. City of New York, 21 Wall. 203.

Edwards vs. Kearzey, 6 Otto 599.

In the case of *Louisiana vs. New Orleans*, *supra*, this Court says, using pretty much the same language was used by the Court in the case of *Garrison vs. City of New York*.

"A judgment for damages, estimated in money, is sometimes called by text writers a specialty or contract of record, because it establishes a legal obligation to pay the amount recovered; and by fiction of law, a promise to pay is implied

where such legal obligation exists. It is on this principle that an action *ex contractu* will lie upon a judgment. But this fiction cannot convert a transaction wanting the assent of parties into one which necessarily implies it. Judgments for *torts* are usually the result of violent contests, and as observed by the Court below, are imposed upon the losing party, by a higher authority, against his will and protest. The prohibition of the Federal Constitution was intended to secure the observance of good faith in the stipulation of parties against any State action. Where a transaction is not based upon any assent of parties, it cannot be said that any faith is pledged with respect to it; and no case arises for the operation of the "prohibition."

In *Fletcher vs. Peck*, 6 Cranch 137, Chief Justice Marshall defined a contract to be a "compact between two or more parties."

In *Blount vs. Windley* (5 Otto), 95 U. S. 176, Mr. Justice Miller, in delivering the opinion of the Court, on page 176 says: "It is undoubtedly true, in some sense and for some purposes, that a judgment has been treated and considered as a contract." * * * "But the judgment is only a contract because it is evidence of a debt or obligation on the part of the defendant due to plaintiff. The judgment itself presupposes, and is founded on some antecedent obligation or contract, and is only a higher evidence of that contract because it now has the sanction of the judicial determination of its validity and amount by a court of law. The essential nature and character of the contract remain unchanged; and in deciding how far it may be affected by legislation, we *must look mainly to the original contract.*" And on page 177, he says: "It will thus be seen that independent of statutes the Courts have long exercised the power of extinguishing judgments by compelling the plaintiff to receive something else than money in satisfaction thereof." And then, after speaking of sets-off obtained after judgment, he says: "In such cases it must be within the competency of the legislative body so to extend the remedy by settoff as to

embrace them." This case was one in which a statute of North Carolina, authorizing a defendant against whom a judgment had been obtained by a bank to set-off notes of the bank which he had procured after judgment.

"What was the evil against which the Constitution intended to provide, by declaring that no State shall pass any law impairing the obligations of contracts? What is a contract, and what is the obligation of a contract? A contract is defined to be an agreement between two or more persons to do or not to do a particular thing. The obligation of a contract is found in the terms of the agreement, sanctioned by moral and legal principles" and again "when we speak of the obligation of a contract, the mind seems necessarily to refer to an executory contract; to a contract under which something remains to be done, and there is an obligation on one or both of the parties to do it. No law of the State shall impair this obligation by altering it in any material part. This prohibition does not apply to the remedy, but to the terms used by the parties to the agreement, and which fix their respective rights and obligations. The obligation and the mode of enforcing the obligation are distinct things. The former consists in the acts of the parties, and is ascertained in the binding words of the contract. The other emenates from the law making power, which may be exercised at the discretion of the Legislature, within the prescribed limits of the constitution.

The above is the language of McLean, J., in the case of *Charles River Bridge vs. Warren Bridge*, 11 Pet. 573.

In *Baltimore and Susquehanna R. R. Co. vs. Nesbitt et al.* 10 How. 398. Mr. Justice Daniel, in delivering the opinion of the Court said: "It must be certainly shown that there was a perfect investment of property in the plaintiff in error, by contract with the Legislature, and a subsequent arbitrary devestiture of that property by the latter body, in order to constitute their proceeding an Act impairing the obligation of a contract."

In this case, by an Act of the Legislature of Maryland incorporating the Baltimore & Susquehanna Railroad company, it was provided in substance, that an inquisition should be made, in the mode provided for in the Act, to ascertain and assess the value of land, &c., to be acquired by the company; that the inquisition made should be returned and filed in Court, and the same should be confirmed by the court, if no sufficient cause appeared to the contrary.

An inquisition was had condeming the lands of Penelope D. Goodwin, it was returned to the court, and on April 24, 1837, the court "ordered that this inquisition be ratified and *confirmed*, no cause to the contrary being shown."

After this in December, 1941, the Legislature passed a a statute by which it directed, "that the Baltimore County Court should set aside the inquisition found for the Baltimore & Susquehanna Railroad company, condeming the lands of Penelope D. Goodwin of said county, and that the said court direct an inquisition *de novo* to be taken." Afterwards said county court did direct such new inquisition and did "adjudge and order" that the said first inquisition be set aside. An appeal took the case to the Supreme Court of the United States.

It was insisted, on behalf of the company:

1. That the charter was a contract and that the Act of December 1841, impaired its obligation.

2. That title to the land passed by the confirmation and that therefore the Act of 1841 divested vested rights.

The Court held, for the reasons given by it, that the Act of 1841 neither impaired the contract or divested vested rights, and on page 400 said: "This intervention was simply the award of a new trial of the proceedings under the inquisition, which proceedings were of no avail as a judgment after such new trial was allowed," and quotes approvingly the case of *Calder vs. Bull*, *supra*. And still further on, on

page 402, the Court proceeds: "Now it must be apparent that the Act of the Maryland Legislature of December, 1841, simply ORDERING A NEW TRIAL of the inquisition does not fall within any definition given of an *ex post facto* law and is not therefore assailable on that account."

Chief Justice Marshall said, in *Sturges vs. Crowninghield*, 4 Wheat 197, in speaking of the meaning of the Constitution of the United States: "It would be difficult to substitute words which are more intelligible or less liable to misconstruction than those which are to be explained. A contract is an agreement in which a party undertakes to do or not to do a particular thing. The law binds him to perfrom his underaking; and this is, of course, the obligation of his contract."

In *Todd vs. Crumb*, 6 McLean 172, it was held, that "a judgment is not an agreement, contract or promise in writing, nor is it in a legal sense a specialty."

Story says, in his work on Contracts: "Mutuality is of the very essence of a contract, not only mutuality of assent implying free and deliberate action of the parties in coming into the contract, but mutuality in things agreed to be done by the contract."

Freeman in his work on Judgments, section 4, chapter 1, says: "It seems then, that in order to prove that a judgment is in the nature of a contract, we must supply two of the these essentials of each contract by implication and the third by some means not yet discovered."

Whatever may be the law with reference to a judgment rendered in an action *upon a contract*. Surely a judgment in an action *ex delicto* for a *tort* has not the essential elements and ingredients of a contract.

The case of *Barry vs. Gunn*, 15 Wal. 610, so much relied upon by counsel, it is submitted is not a case in point here. That case is not a case where the judgment was on an action

ex delicto and where a State convention undertook to give relief against a great leagal wrong in order that justice may be arrived at.

That case was one in which the Legislature by Homestead Act endeavored to shield the defendant's land from the effects of a legal judgment—a case in which the Legislature endeavored to take away the legal remedies for the enforcement of a *judgment upon a contract*. For it is evident that the judgment in that case was one in an action on the contract. It was for $402.30 principal and $129.60 interest (in all $531.90), see page 612. It was a judgment for a *debt contracted* before the exemption law, see page 621. And the Court on page 623, uses this language: The legal remedies for the *enforcement of a contract* which belong to it at the time and place where it was made, are a part of its obligation."

So it was in the cases of *Robert's adm'r vs. Cooke;* and *Murphy vs. Guskins*, 28 Gratt. 207, in which the Court of Appeals of Virginia, taking Blackstone's definition, says that the judgments in these cases are contracts of record. But an examination will show that the judgments there were rendered *upon written contracts*, the obligations of which are protected by the Constitution.

So too this was the case in *Ratcliffe vs. Anderson*, reported in recent volume of Grattan's reports.

In the case of *Whitaker vs. Rector*, 29 Grat., 717. it was held that the defendant could not hold the benefit of the exemption against a judgment for a fine because the exemption law applied only to *debts contracted*. A judgment therefore, especially in an action in *tort*, cannot be a contract. The *obligation* of a contract is the contemporaneous law authorizing its enforcement, 1 How, 311 2 How, 608, 6 Otto 595, 4 Wheat 122.

An interesting review of many of the authorities upon this subject may be found in the opinion of the Court in the case of *In re Sarah Kennedy and others*. 2 S. C. (Richardson), 216.

In the case of *Rae vs. Hulbert et al.* 17, Ill. 579, 580, Caton Judge, delivering the opinion, uses the language "We cannot agree with counsel that a judgment is a contract within the meaning of the statute. It is a conclusion of law upon the rights of the parties and it is not very common that it is entered into by the agreement of the unsuccessful party, but the reverse is generally the case." * * * "A judgment is no more a contract than a tort." * * * "No one will pretend that actions of tort are within the spirit and extent of the statute."

See also *Watson vs Mercer*, 8 Pet. 88.

Baddeson vs. White, Bur. 145; 61 Barb. 487.

But why multiply authorities? These are surely sufficient upon this point.

2. The plaintiff insists that the judgment, in this case rendered in an action in *tort* was his "property", in which he had a "vested right" of which he is deprived by the provision of the of the State Constitution, "without due process of law."

Is a judgement in an action of tort "property"? And does such judgment give the plaintiff a "vested right" in "property"?

It may be remarked; that the provision of the State Constitution did not change any right or existing rule of law. It merely declared an old and tell established rule of law, recognized by all enlightened nations and learned Courts; it only sought to put an end to a threatened wrong; to arrest and prevent the consummation of a wrong; and to forbid the exercise of any of the powers of the government to consummate such wrongs.

In whatever stage these suits had reached, short of completion, there they were intended to stop. Unjust in their begiinnging, possessing neither legal nor moral right, they could acqire none by the use of remedies designed to enforce just claims.

In the case under discussion, there was at least in its origon, *no right*, either legal or equitable, and there could not have been a judgment, had the defendant been permitted to plead his plea "of belligerent right?"

There may have been some ficitous or perhaps, *prima facie* right at law, by reason of an illegal judgment in an action *ex delicto;* a right which arose by operation of law or by the operation of a legal remedy: but that is not a *fixed* or *vested* right in or title to property. A man may not be deprived of his property without process of law, but he can be deprived of a legal right, a *prima facie* right, which might afterwards prove an absolute enjoyment in him, when the fruits of chat right came to be harvested.

Whilst a judgment may in one sense, be a right, yet it is not a *vested* right of property, not a right which cannot be changed or touched or altered; It can be set aside. It requires something to aid it, something to assist it, before there is an actual enjoyment of property.

Cooly says in his work upon Cons. Lim. p 370. "There is no doubt of the right of the Legislature to make laws which reach back to and change or modify the effect of prior transactions, provided retrospective laws are not forbidden, *eo nomine*, by the State Constitution."

Again, on page 358, Cooley says. "the term vested right" is not used in a harrow or technical sense, as importing the power of legal control, merely, but rather as implying a vested interest which it is equitable that goverment should recognize, and of which the individual cannot be deprived without injustice!

In *Freeborn vs. Smith*, 2 Wall 161. Mr. Justice Grier, in delivering the opinion of the Court, uses this striking language:

"If the judgment below was erroneous, the plaintiff in error had the moral right at least to have it set aside and the defendant is only *claiming a vested right in a wrong judgment.*

"The thruth is", says Cheif Justice Parker, in *Forster* vs. *Essex Bank*, 16 Mass. 245, "there is no such thing as a *vested right to a wrong*. and the Legislature which in its Acts, not expressly authorized by the constitution, limits itself to correcting mistakes and providing remedies for the furtherance of justice, cannot be charged with violating its duty or exceeding its authority.

"Such acts are of a remedial character and are the peculiar subjects of Legislation. They are not liable to the imputation of being assumptions of judicial power."

In *Knote vs. United States* (5 Otto) 95 U. S. 154-155, this Court, Justice Field, delivering the opinion, substantally held that a decree or judgment is not property.

In *Murray vs. Charleston* (6 Otto) 96 U. S., 433, it is held; Syllabuy 4: "Debts are not property. A non-resident creditor of a city cannot be said to be in virture of a debt which it owes him, a holder of property within its limits."

In some States, as in Virginia, there are laws, which have been held to be constitutional, which entirely divest vested right of property and the title thereto; such are the laws, which forfeit lands, *ipso facto*, for the non-payment of taxes.

Wilkie vs. Surpell 10 Grat 405.

The Court of Appeals of Kentucky in the case of *H. & W. R. R. Co.* vs. *Dickerson*, 17 B. Mon. 177, says "The appellee has a vested right in his land. This right cannot be divested under the Constitution until just compensation has been made him for it. The *judgment* which he obtained did not divest him of his right to his property, nor did it enlarge his rights nor invest him with any additional ones. He could not have a vested right to the land and also to the amount of the judgment.

A *vested right* to the latter *could not accrue until the money was collected.*

Again—A judgment in trespass or conversion, actions *ex delicto*, vests no title in the defendant to the property about

which the suit was instituted, until the judgment is *completely satisfied*, and the value of the property as ascertained by the Court, has been paid to the plaintiff; until this the plaintiff cause of action does not cease to be held by him and he still has claim to further proceedings based upon it. Such, says Freeman in his work on Judgments, Section 237, is the decision of the American Courts.

This doctrine is distinctly announced by Justice Miller, of this Court, in the case of *Lovejoy vs. Murray* 3 Wal, 1.

The Constitution does not prohibit the passing of laws which merely take away a right of action or only divest rights vested by law in an individual.

2 Story's Const. Sec. 1398.
Smith's Com. Const. Law Sec. 266-7, 378.

The case of *Calder et ux. vs. Bull*, 3 Dall, 386 is one in point.

By reference to that case it will be seen that on the 21st of March, 1793, the Court of Probate disapproved a will and *refused its record*, no appeal was taken before the right of appeal was barred, and the judgment of the Court seemed to be fixed, and rights of property settled by it, yet in May, 1795, the *Legislature* (not the Court acting after examination into facts by authority of the Legislature) set aside the decree and granted a new hearing by the same Court of Probate; with a right of appeal within six months. A re-hearing took place, the will was then approved and ordered to be recorded. An appeal carried the case to the Supreme Court of Appeals of the State, and there the last decree was affirmed, and from that an appeal was had to the Court of Errors of the State, which adjudged there was no error; and from that Court the case carried to the Supreme Court of the United States, where the judgment was affirmed.

This case of *Calder et ux* vs. *Bull* is relied upon as authorit, in several cases herein cited, and especiallyby the Cuorts in *Susquehanna R. R. Co.*, vs. *Nesbit*, 10 How, 401; *Feeman vs. Smith*, 2Wal, 172.

The case of *Sampeyreac & Steward* vs. *The United States* 7 Pet. 222 was an appeal from the Supreme Court of the Territory of Arkansas. Court below rendered its decree in proceedings instituted under an Act of Congress passed May 1830, entittled "An Act for further extenting the powers of the Judges of the Supreme Court of the Territory of Arkansas under the Act of 26th May, 1824," etc. This Act of Congress authorized the said Court to proceed, by bill of review, to revise its decrees in certain cases therein named, and provided that, in every case wherein it should appear to the Court on such bill of review, that there had been a forgery of any of the papers named, it should be lawful for the Court to reverse and annul its former decree.

It was claimed in this case, that the said Act (of 1830) was unconstitutional, that it interfered with rights vested under a former decree of a court and also that it was a *judicial* and not a legislative Act. But the Supreme Court of the United States held, that the said Act was not unconstitutional that it did not interfere with or take away vested rights, that the most that could be said was, that the remedy by *appeal* from the first decree was lost by reason of the statute limitations of one year, but that "the Act of 1830 provides a new remedy" and "considering the Act of 1830 as providing a remedy only, it is entirely unexceptionable." And the Court goes on to say, that "it has been repeatedly decided in this Court, that the retrospective operation of such a law forms no objection to it; almost every law providing a new remedy affects and operates upon the cause of action existion at the time the law was passed. The law of 1830 is in no respect the exercise of *judicial* powers."

In *McMullen vs. Hodge*, 5 Texas 33, the Court says, in effect, that "it is undoubtedly in the power of a constitutional convention to destroy rights of individuals, and to take them, if needs be, away."

See also *Oliver, Lee & Co. vs. Bank*, 21 N. Y., 9.

In the case of *McVeigh vs. United States*, 11 Wall 259, Judge Underwood had stricken the defendent's answer from the record and then gave judgment against him. Mr. Justice Swayne, in reviewing this case, used this language: "In our judgment the District Court committed a serious error."

* * * "As we are unanimous in this conclusion, our opinion will be confined to that subject. The order in effect denied the defendant a hearing. It is alleged that he was in the position of an alien enemy, and hence could have no *locus standi* in that form. If assailed there he could defend there. The liability and the right are inseperable. A *different result would be a blott upon our jnisprudence*. We cannot hesitate to doubt upon the subject."

Turning then to the case of *Gregory vs. McVeigh*, 23 Wall 239, the Court will find that McVeigh brought ejectment against Gregory, a purchaser under one of the Underwood decrees, and that upon the trial of the ejectment, Gregory set up his purchase and requested the Court below to charge that "the decree of condemnation divested McVeigh of his life estate." The Court refused so to charge, but contrarywise charged, that "the sentence of condemnation was *void*, and the plaintiff was not divested of any part of his title in the premises by reason of the sentence, sale, and deed of the marshal; because the answer, claim, and appearance of McVeigh were struck from the files by the Court before the decree was entered, and the said McVeigh was denied a hearing, and his property condemned, without any opportunity of defence on his part." And therefore a judgment was rendered in favor of the plaintiff McVeigh, in the Court below, to which judgment the Court of Appeals of Virginia refused to grant a writ of error. A writ of error was allowed by the Supreme Court of the United States, in which Court a motion was made to dismiss the case for want of jurisdiction, which motion was *denied*. The Supreme Court confirmed the judgment of the Court below, see (3 Otto) 93

U. S. 284, and thus it was held that the judgment of condemnation was not only *void*, but that it could not be so treated in a collateral action of ejectment.

In the case of *Windsor vs. McVeigh*, (3 Otto) 93 U. S. 288, Mr. Justice Field, who rendered the opinion of the Court, says: "The doctrine invoked by counsel that where a Court has once acquired jurisdiction it has a right to decide every question which arises in the cause, and its judgment however erroneous cannot be assailed, "is *only correct* when the Court proceeds, after acquiring jurisdiction of the cause, *according to the established modes* governing the class to which the case belongs, "and does not transend in the extent or character of its judgment, the law which is applicable to it."

The Virginia Court of Appeals have held the like doctrine in the cases of *Underwood vs. McVeigh*, 23 Gratt. 409; *Fairfax vs. Alexandria*, 28 Gratt. 16.

In the cases referred to the Court had jurisdiction of the cause of action and of the person, as in this case the court did. The only difference is, that in those cases the Court would not permit the defendant McVeigh to make *defense*. In this case the Court would not permit the defendant to make *the only defense* which could or would be available to him.

Missouri has a constitutional provision very similar to ours. Section 35, article 8.

In the case of *Drehman vs. Stifel* 8 Wall. 598, the Supreme Court of the United States holds clearly that the Legislalature "has a right to pass retroactive laws, where there is no inhibition in the State Constitution, provided they do not impair the obligation of a contract and are not *ex post facto* in their character," even if those laws deprive a party of a right of action *ex delicto* or of a right of possession, or of a right of using remedies *provided by law*.

In the case of *Missouri vs. Getzweiler et al.*, 49 Mo. 17, the Court of Appeals of Missouri held that "The Constitution of the United States does not prohibit a State from enacting retrospective laws of a *civil nature* which *take away* "even," *a*

right of action, or *divest rights* invested in an individual if the laws do not impair the obligation of a contract nor divest *settled rights of property*."

In the case of *Grim vs. Weissenburg School District*, 57 Pa. St. 435, Judge Sharswood says: "If an Act of Assembly be within the legitimate scope of Legislative power, it is not a valid objection that it divests vested rights. There is no clause either in the Constitution of the United States or of this Commonwealth, which prohibits retrospective laws," * * * Retrospective laws and State laws divesting vested rights, "*" do not fall within the prohibition contained in the Constitution of the United States, however repugnant they may be to the principles of sound legislation."

In the case of *Satterlee vs. Mathewson* 2 Pet. 414, Justice Washington who delivered the opinion of the Court in commenting upon the opinion in the case of *Fletcher vs. Peck*, 6 Cranch 87, says: "It is nowhere intimated in that opinion that a State statute which divests a vested right, is repugnant to the Constitution of the United States."

In the case of *Watson vs Mercer* 8 Pet. 110, Judge Story uses this language, "It is clear that this Court has no right to pronounce an Act of the State Legislature void, or contrary to the Constitution of the United States from the mere fact that it divests antecedent right of property."

See also, in this connection the case of *Hepburn vs. Curtis*, 7 Watts 300.

The *B. & S. R. R. vs. Nesbit*, 10 How. 398.

Leland vs. Wilkenson, 10 Pet. 294.

Vance vs. Vance 108 U. S. 514.

Gross vs. U. S. Mortgage Co. 108 U. S. 477.

McGruder vs. Lyons 7 Gratt. 233.

Wyatt vs. *Norris* 2 W. Va. 575.

Burner &c. vs. Porter 9 How 235.

12 N. Y. 209, 4. Barb. 64 1 Atk, 182.

The Legislature can abolish old remedies.

Ludlow vs. Jackson, 3 Ohio 553.

Bank vs. Dudley 2 Pet. 492.

Yeaton vs. United States 5 Cranch 281.

Owens vs. Curran, 15, W. Va. 208.

Ex parte McCardle 7 Wall. 507, 4 Dall 372, 11 Pick. 350; 21 Pick. 373; 21 N. Y. 99; 29 Conn. 272.

Every State has control over the remedies it will afford to parties in its Courts.

42 Maine 429; 10 Iowa 470; 12 Iowa 282; 2 Doug. (Mich.) 197; 3 Kan. 123.

Railroad Co. vs. Grant, 98 U. S. 401; 5 Wall. 504.

Upon this question of legislative power see 1 Hill 324, 10 N. Y. 374; S. C. Supreme; 4 How. Pr. R. 145; 4 Cow. 305; 16 Barb. 192; 40 N. Y. 561; 6 Pick. 508; 9 Cush. 279; 7 Watts 300; 16 Mass. 245; 17 How. Pr. R. 459.

3. But; is it necessary to decide the question discussed, as to whether the judgment in this case, was "property", or constituted a "vested right" in property, in the plaintiff? Was the decision of that question necessary to the detirmination of the cause in the Supreme Court of West Virginia?

In the case of *N. O. Water works vs. La Sugar Co.*, 125 U. S. 29, this Court has used, Mr. Justice Gray delivering the opining, the following language:

"And in many recent cases, under section 709 of the Revised Statutes, this Court, speaking by the Chief Justice, has re-asserted the rule, that to give it jurisdiction of a writ of error to a State Court, it must appear affirmatively, not only that a federal question was presented for decision to the highest Court of the State having jurisdiction, but that "its decision was necessary to the detirmination of the cause, and that it was actually decided, or that the judgment as rendered could not have been given without deciding it."

The Supreme Court of West Virginia, decided the principles involved here, in this very case, founding its decision on what had been announced in the case of *Peerce vs. Kitzmiller*.

See, *Freeland vs. Williams*, 19 W. Va., 601.

Peerce vs. Kitzmiller, 19 W. Va., 578.

In the last named case, (see page 578) the Supreme Court of West Virginia distinctly held, "But it is not necessary to enquire, whether judgments are property within the meaning of the Fourteenth Amendment of the Constitution of the United States, because sec. 35 of Art. 8, of our Constitution treats them as if the 14th Amendment applied to them, and provides for the carrying out of the provisions by "due process of law." "Then clearly there is nothing in said section of our Constitution, which is prohibited by the Constitution of the United States."

Is not that holding clearly right? At any rate it is the construction put by the State upon its own Constitution; And where no federal question is involved, this Court must follow that construction. *Fairfield vs. County of Gallatin*, 100 U. S. 47.

In the case of *Peerce vs. Kitzmiller*, supra, the Supreme Court of West Virginia, commencing upon page 578, of the case, as reported, discusses the meaning of the expression, "due process of law." I respectfully invite the attention of the Court to that discussion.

Permit me also to call the attention of the Court to the opinion of Mr. Justice Field upon this subject, in the case of *Missouri Pacific Railway Co. vs. Humes*, 115 U. S., commencing on page 519.

Also to the opinion delivered by Mr. Justice Miller, in the case of *Davidson vs, New Orleans*, 96 U. S. 97.

Also to the case of *Kennard vs. Louisiana ex rel. Morgan*, 92 U. S. 483.

Also to *McMillan vs. Anderson*, 95 U. S. 37.

Slaughter House Cases, 16 Wall. 36.

Murray's Lessee et.al v. Hoboken Land Improvement Co., 18 How 272.

The Court of Appeals of West Virginia, decided as has been shown, that the provision of the State Constitution enforced itself, *ex prorio vigore*. The remedy sought in this case was the aid of a Court of Equity, by way of the ordinary writ of injunction. In *Ogden vs. Saunders*, as has been stated, this Court said: "It is equally the right and duty of governments to impose limits to the avarice and tyranny of individuals, so as not to suffer oppression to be exercised under the semble of right and justice."

As we have said Equity can interfere if there is accident, inadvertance, mistake. fraud, newly discovered testimony, or abuse of process of law, even, without the intervention of any statute. The Legislature of West Virginia, as the Supreme Court of that State decided, had not provided, by general law, for giving full force and effect to the section of the Constitution of the State, (which, the same Court decided was of force of its own vigor), by due process of law. The plaintiffs sought to enforce by final process of the Court the said judgment, and Equity interfered; was not that "due process of law?"

Take the definition given in the case of *Westervelt vs. Gregg*, 12 N. Y. 209, a short and simple definition: "Due process of law undoubtedly means, in the due course of legal proceedings, according to those rules and forms, which have been established for the protection of private rights," can there be any doubt that a Court of Equity had the authority and jurisdiction to enjoin the judgment in this case?

I have perhaps trespassed too far upon the patience of this Court: I submit the case, trusting that this just remedy against an oppressive judgment will not be denied: and that the voice of the people" of the State may be declared to be, "the voice of the law."

Respectfully submitted,

ROBERT WHITE,

Counsel for the defendant in error.

Off. Supreme Court, U. S.
FILED
APR 17 1889
JAMES H. McKENNEY
CLERK

BRIEF FOR THE DEFENDANT IN ERROR

IN THE CASE OF

DAVID FREELAND, Plaintiff in Error,

vs.

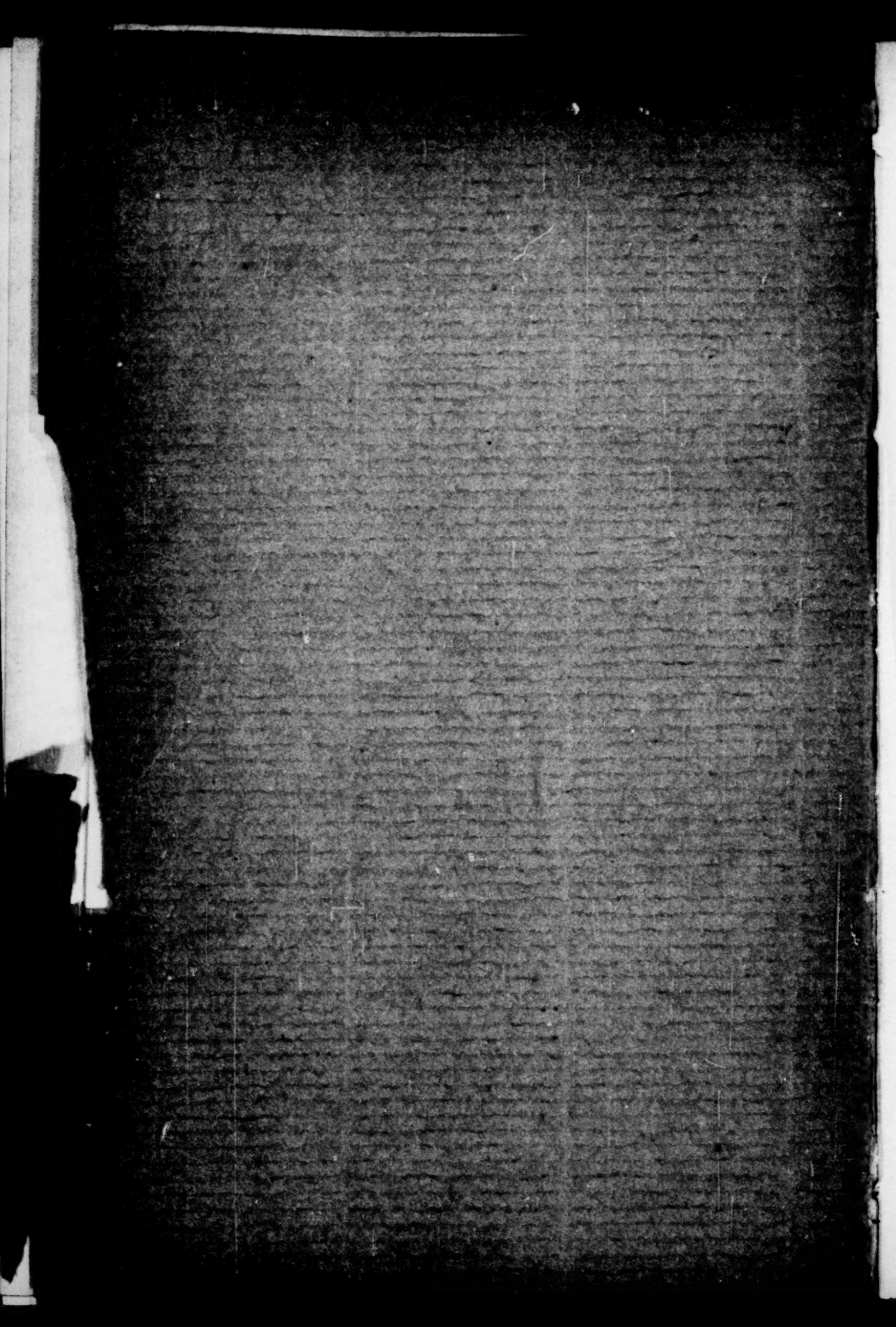
JOSEPH V. WILLIAMS.

In Error to the Supreme Court of Appeals of the State of West Virginia.

OCTOBER TERM, 1888—No. 267.

CHAS. J. FAULKNER,
Counsel for the Defendant in Error.

McQUEEN & WALLACE, PRINTERS, 1108-1116 E STREET, WASHINGTON, D. C.



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It is but just to the court, and to the defendant in error, that one or two statements made by the plaintiff, in his petition for a writ of error, should be noticed, before proceeding to consider the legal questions involved in the record.

He states:

"Secessionists often became pilots of raiding parties of Confederate forces, who took property of Union men without compensation, while their Confederate neighbors saved their property or were paid for the same in good money.

"At the close of the war, and even before, the West Virginians who had thus piloted these foraging squads of Confederates, on returning to their homes were sued in actions of trespass in the courts by Union men who had thus lost their property and judgments obtained by them against such raiders by due process of law."

This would imply that the facts involved in the case presented in this record were analogous to those stated in the petition for error.

The most cursory examination of the evidence found in the record will at once convince your honors that there is no similarity in the facts as stated in this part of the petition and the case presented for your adjudication. It may not be considered of sufficient importance to have even called the attention of the court to it, but as the decision in favor of the defendant in error rests entirely upon the fact that the trespass with which he is charged was an act done "according to the usages of civilized warfare," we deem it proper to call the attention of the court to the evidence of Joseph V. Williams, on page 11 of the record; of Charles Williams, on page 12; and of Charles H. Vandiver, on page 13, which, without any conflicting evidence, conclusively shows that the act for which the defendant in error was held responsible was the forcible taking of certain cattle, claimed to belong to the plaintiff in error, under orders of his superior officer, for the use and benefit of the Confederate army.

Were the facts different from those found in the evidence referred to, we can scarcely imagine that the counsel of the plaintiff would have failed or neglected to have introduced testimony in contradiction to that given by the witness named.

Another statement, equally uncalled for and unfounded, is set up in the petition for error as follows:

> "The journal of that constitutional convention shows that its prominent leaders and those who were active in securing the adoption of this section of the constitution were persons against whom judgments of this class were then pending in full force, and from which judgments then 'no due process of law,' 'no law of the land,' could relieve them."

This provision of the State constitution was presented to the convention by a former officer of the Federal Army who had served with distinction during the late civil war, and was passed by unanimous consent. So far as the record of the proceedings of the convention shows, no division or yea-and-nay vote was demanded, and we therefore have the right to assume that it met the approval and received the concurrent favorable judgment of its members, regardless of past or present political or sectional differences.

Statement of Case.

In January, 1864, the defendant in error, Joseph V. Williams, was an enlisted Confederate soldier, being a private in Company F, Seventh Virginia Cavalry, in the brigade of General Rosser, and in the division of General Fitzhugh Lee, who commanded the expedition into the counties of Grant and Hardy; that at the time stated cattle were taken from the farm of a Mr. Babb, which cattle were subsequently claimed as the property of David Freeland, the plaintiff in error; that in the language of Lieutenant Vandiver, in whose company the defendant in error was an enlisted soldier, "there were a good many cattle taken by order of General Fitzhugh Lee, for the use of the Confederate army; that Joseph V. Williams participated in the taking of the cattle, as a private soldier, acting under orders of his superior officer; that the cattle were driven south within the Confederate lines, for the use of the Confederate army; that said Williams received no personal benefit from the taking of said cattle."

Upon this state of facts, which we may assume are true, as there are no conflicting statements by witnesses, the plaintiff in error instituted a suit in trespass against the defendant in error in the circuit court of Preston County, and on the 22d of December, 1865, recovering a

judgment for $1,110, with interest thereon from January 4, 1864, and costs.

An appeal was taken from the judgment rendered by the circuit court to the court of appeals, and at the July term of 1867 said court affirmed the judgment of the lower court.

The vital error of the inferior court in its ruling, on which the appeal was taken, was the refusal to permit the filing of three special pleas, setting up as a defense the fact that the taking of the said cattle was done by the said Williams as a private soldier, under orders of his superior officer, in a civil war in which the authority which controlled his action had been recognized by the political department of the United States Government, as entitled to belligerent rights, which action of the Federal Government protected him for acts done under authority of his superior officers in the legitimate prosecution of the war.

The appellate court sustained the rejection of the pleas upon the authority of the cases of Hedges *vs.* Michel and Price *vs.* Lutman, decided at the same term, briefly passing upon the question in the following language:

"I think, therefore, that the pleas quashed and the pleas rejected, the latter of which, though more formal, were not more substantial, contained no justification nor defense to the action, and were rightfully rejected by the court, though not for the reason assigned for doing it." (The inferior court had rejected said pleas because filed too late.)

Williams *vs.* Freeland, 2 W. Va., 306.

In 1872 the constitutional convention was called, which inserted the following provision in the organic law of said State:

"Section 35, article 8, of the constitution of West Virginia, 1872.—No citizen of this State who aided or partici-

pated in the late war between the Government of the United States and a part of the people thereof on either side shall be liable in any proceeding, civil or criminal; nor shall his property be seized or sold under final process issued upon judgments or decrees heretofore rendered, or otherwise, because of any act done according to the usages of civilized warfare in the prosecution of said war by either of the parties thereto. The Legislature shall provide, by general law, for giving full force and effect to this section by due process of law."

Subsequently, on the 15th of August, 1883, the said Williams filed his bill in equity in the circuit court of Preston County, setting up said judgment in favor of the said Freeland, and averring "that the action in which said judgment was obtained was not '*ex contractu*,' but an action '*ex delicto*;' that it was in fact for cattle or other personal property alleged by the defendant to belong to him, and taken by the military authority of the Confederate States, by the soldiery and military authorities aforesaid, during the late war between the Government of the United States and a part of the people thereof; that said judgment was for acts done according to the usages of civilized warfare, in the prosecution of said war by the said Confederate States and the military power and authority thereof."

He further alleges that he is a citizen of the State of West Virginia; that the judgment is void, and unless it is judicially annulled he is in danger of having his property seized and sold to satisfy said judgment, resting his right to relief upon the validity of the thirty-fifth section of the eighth article, hereinbefore quoted.

An injunction was granted to the enforcement of said judgment and execution, and thereupon the said Williams and his sureties entered into bond in the penalty of $3,500, conditioned according to law.

The plaintiff in error appeared and demurred to said bill, and also filed an answer to the same. His answer

and demurrer presents two questions of Federal jurisdiction:

First. That section 35, article 8, of the constitution of West Virginia impaired the obligation of a contract, existing by reason of the judgment obtained by the plaintiff in error against the said Williams prior to the adoption of the said section, and therefore it was in violation of and repugnant to section 10 of the first article of the Constitution of the United States.

Second. That said section and article of the constitution of West Virginia, adopted after the rendition of said judgment, deprives the said plaintiff in error of his property in said judgment without due process of law, and is, therefore, in conflict with and repugnant to the first section of the fourteenth amendment to the Constitution of the United States.

The circuit court overruled the demurrer, and on the hearing of the case upon the bill, answer, general replication, depositions of witnesses, and arguments of counsel a decree was rendered in favor of the defendant in error, declaring said judgment void and perpetually enjoining and restraining the plaintiff in error from the enforcement and collection of the same. From this decree the plaintiff in error asked an appeal, which, after an inspection of the record, was refused by the court of appeals of the State of West Virginia, and the decree rendered in the circuit court on the 14th of April, declaring said judgment void, was affirmed.

SUGGESTIONS WHY THE THIRTY-FIFTH SECTION OF ARTICLE 8 WAS ADOPTED BY THE CONVENTION AND SUBSEQUENTLY BY THE PEOPLE.

The people of West Virginia were greatly divided in sentiment on questions which caused and grew out of our

great civil convulsion. As a border State the armies of the contending forces were, by their movements, continually changing their location and position. Her citizens one day would be under the authority of the Confederate forces, the next would wake up to find the power of the United States Government restored.

When the Confederate army had possession they impressed for public use the property of citizens, both loyal and disloyal. When the change took place, and Federal supremacy was asserted, property of sympathizers with those in rebellion would be impressed and seized by United States officers.

From these acts great bitterness of feeling between former friends and neighbors resulted.

When the armies of the United States were victorious, the rebellion crushed, and the citizens who had enlisted in the Confederate army returned to their homes in obedience to their parole, they found that all those who "had aided or abetted" or who had "sympathized with" those in rebellion were denied the rights of citizenship; were excluded from the professions, from jury service, from the courts; were amenable to actions brought by loyal citizens of the State, but were denied the right to sue themselves. So far did the prejudices and passions of the hour carry the Legislature that it enacted a law which denied to one against whom a judgment had been taken in his absence, on constructive notice, the right even within the time prescribed by law to reopen the same.

All of these denials of the civil rights of the citizens were sustained by the judgments of the highest court in the State.

The court of last resort in the State went a step beyond the proscriptive legislation referred to, and denied to defendants, sued in trespass for acts done in their capacity

of soldiers, under orders of superior officers, the plea of belligerent rights.

See Hedges *vs.* Price, 2 W. Va., 192.
Williams *vs.* Freeland, *Id.*, 306.
Lively, executor, *vs.* Ballard, *Id.*, 496.

In the case of Echol *vs.* Staunton, 3 W. Va., 574, they affirmed the ruling of the inferior court which announced the following principles of law to the jury:

"If the defendant was neither directly nor by his orders engaged in the commission of the alleged trespass, yet he would be liable if he advised or aided or abetted those who did commit the alleged trespass."

President Johnson, in the case of Pierce *vs.* Kitzmiller, 19 W. Va., 571, in commenting upon this instruction, fairly states what was the practical effect of that ruling upon the inferior courts of our State in subsequent actions for trespass. He observes:

"This is not directly saying that they were liable if they had nothing whatever to do in taking the property, yet the instruction was calculated, and doubtless intended, to give the jury to understand that if the party sued was 'aiding and abetting his comrades' in the prosecution of the war, he was equally liable for the property taken by said comrades, whether he aided and abetted the taking or not."

Under these acts and rulings of the court many judgments were obtained.

When the most distinguished citizens of the State, of both political parties, met in convention, they appreciated the gross injustice which had been done to one class of her citizens, and with a unanimity unparalleled at that early period subsequent to the war sought by the incorporation of the thirty-fifth section of article 8 to undo, as far as

possible, the wrong of the past, and to declare by organic enactment, the principle so ably and fearlessly announced by this distinguished tribunal.

Justice Harlan, in the case of Ford *vs.* Surgott, 97 U. S., 605, with clearness and lucidity deduces from the various decisions of this court upon the question which we are now considering, the following principle:

"To the Confederate army was, however, conceded, in the interest of humanity, and to prevent the cruelties of reprisals and retaliation, such belligerent rights as belong under the law of nations to the armies of independent governments engaged in war against each other, that concession placing the soldiers and officers of the rebel army, as to all matters directly connected with the mode of prosecuting the war, 'on the footing of those engaged in lawful war,' and exempting 'them from liability for acts of legitimate warfare.'"

The public history of the State covering a period between 1865 and 1873, to which I have briefly called the attention of the court, places your honors in possession of the circumstances which necessarily influenced the representatives of the people in submitting this provision to the approval of their constituents. In our humble judgment, it declares a policy which should command the approval of every fair and impartial mind. It is just, broad, and patriotic in its statesmanship. It recognizes the magnitude of the interests involved by announcing a public policy that no fiction or strained construction of the constitution should be employed to defeat. It declares that the principles announced by the highest judicial tribunal of this country was, is now, and shall hereafter be the principle that shall govern the departments of the State government in passing upon the rights of persons by reason of "acts done according to the usages of civilized warfare during the existence of the late great civil

war." It comes before this tribunal stamped with the approval of the people of the State, acting in their sovereign capacity, controlled by no limitation but that of the supreme law of the land, the Constitution of the United States.

Under the peculiar circumstances surrounding the people of that State, it may be appropriate to apply to that provision the language of a distinguished jurist of Missouri, who, in announcing the opinion in the case of Drehman *vs.* Stifel, 47 Mo., 508, referring to the thirty-fourth section of the eleventh article of the constitution of Missouri, said:

"It is an act of indemnity, oblivion, and pardon. 'Indemnity,' so far as it provides 'that no citizen of this State who aided or participated in the late war on either side should be liable in any civil proceeding, and his property should not be seized or sold on final process issued upon judgments or decrees heretofore rendered, or otherwise, because of any act done according to the usages of civilized warfare in the prosecution of said war by either of the parties thereto.' 'Oblivion and pardon,' in so far as it prohibits 'criminal prosecution' for acts done under such circumstances.

"It breathes a spirit of reconciliation and peace. It seeks to remove one of the greatest obstacles to fraternal reconciliation, by refusing to cupidity and avarice the assistance of the legal process of her courts. It throws the broad mantle of its protection over ALL of its citizens for acts done according to the usages of civilized warfare by the declaration of a doctrine founded in law, justice, and a commendable public policy, resting upon principles which find their illustration in the highest civilization, and their most illustrious champions in the members of this august tribunal."

Have the people of the State of West Virginia, by the adoption of this provision, trespassed beyond the boundaries of that inherent power "reserved to the States respectively or to the people"?

We may eliminate from this discussion several questions which have been adjudicated by this court, and which do not admit of argument.

The people of a State have no more power than the Legislature to incorporate into their organic law any provision repugnant to the Constitution of the United States; but, as stated by Sedgwick on Statutory and Constitutional Law, page 639:

"A State may pass retrospective laws, however unjust; pass acts of a judicial nature, however clearly overstepping the line of legislative power; they may pass acts divesting vested rights; they may violate express provisions of their own constitution. Acts of this class, however objectionable, are not within the scope of restrictions of the Federal Constitution, and give no right of appeal from the decisions of State tribunals."

Whatever errors, therefore, if any, the critical judgment of this court might find in the record, if no provision of the Federal Constitution is violated by the act of the people of that State, this court can grant no relief to the plaintiff in error.

But two Federal questions are fairly presented by the record:

First. Does the thirty-fifth section of article 8 of the constitution of the State of West Virginia impair the obligation of any contract set forth in the record?

Second. Have the people of said State deprived the plaintiff in error of property without due process of law?

We will examine these questions in the order in which they are presented.

It can not be successfully contended by the plaintiff in error that the original cause of action, *the trespass, the tort*, is protected by the clause of the Federal Constitution prohibiting States from impairing the obligations of a contract. Swayne, J., in Drehman *vs.* Stifel, 8 Wall., 602, in discussing the Missouri statute of forcible entry and detainer, and the right of the Legislature to withdraw a remedy which seeks to try a question of possession, and not the right or title, uses this language:

"It can not, therefore, be maintained that this remedy entered into the contract between the lessor and the lessee. The Legislature might have abolished it by repealing the statute, without impairing any right within the meaning of the contract provision of the Federal Constitution acquired while the statute was in force. In this respect it stands on the same footing with any other action *ex delicto*."

McLean, J., in the case of Charles River Bridge *vs.* Warren Bridge, 11 Peters, 881, remarks:

"After a careful examination of the questions adjudicated by this court, they seem not to have decided in any case that a contract is impaired within the meaning of the Constitution where the action of the State has not been on the contract."

In the case of Butler *et al. vs.* Pennsylvania, 10 Howard, 416, the court, in referring to this clause, says:

"Contracts designed to be protected by the tenth section of the first article are contracts by which perfect rights—certain, defined, fixed, private rights—of property are vested."

It would be but a waste of time to review before this court the public history of the country immediately suc-

ceeding the close of the Revolution, to show the reasons which influenced the convention in adopting this clause of the Constitution. It is only important to refer to it as showing how untenable is the position; that its object was to protect any obligations, except those growing out of mutual agreements. The plaintiff in error, appreciating this fact, has sought to rest his case upon the fact that a judgment is a contract within the meaning of the tenth section of the first article, because there is a legal obligation resting upon the defendant to discharge the same by payment. This position goes a step beyond any decision or dictum by the court or its members in construing that clause of the Constitution. It is true that many of the elementary writers, in referring to the classification of contracts, speak of judgments as contracts of record, classing them also with recognizances, etc., but in none of these works will you find a discussion of the elements that enter into a contract of record, or any definition that brings it within the term of a contract as legally understood.

The most accurate legal definition of a contract that I can give is that it is a mutual agreement between two or more competent persons for a valuable consideration touching a legal subject-matter. This definition embraces four distinct elements:

First. There must be parties competent to contract.

Second. There must be a legal subject-matter.

Third. There must be a valuable consideration.

Fourth. There must be mutual assent.

Some authorities have held that in the case of specialties this definition requiring a valuable consideration is not accurate, for the reason that it is not necessary to prove such a consideration. It is true that it is not necessary in such cases to prove a valuable consideration because of the fiction of law that by reason of the dignity of the instrument a valuable consideration is con-

clusively presumed. Under the statutes of many States in suits on simple contracts in writing it is not necessary to prove, unless denied under affidavit, a valuable consideration, but these fictions or statutory provisions do not affect the accuracy of the definition.

None have disputed that to constitute a contract there must be parties competent to contract, and there must be mutual assent of those parties; and yet a judgment can be rendered against a party not competent to contract, as in the case of torts by minors and others, where, instead of mutual assent, there is mutual antagonism.

When you consider the object the framers of this clause of the Constitution had in view, it would be giving a very broad construction to the term "contract" to embrace within its meaning a judgment founded on a tort.

Every definition given by the court in passing upon this clause negatives the theory upon which the plaintiff in error alone rests.

In the case of Fletcher *vs.* Peck, 6 Cranch, 133, Marshall, C. J., says: "A contract is a compact between two or more parties, and is either executory or executed."

Cooley, in his Constitutional Limitations, page 285, in speaking of the term "obligation of a contract," said: "It consists in its binding force on the party who makes it."

He quotes on the same page Story with approval, who refers to the term in the following language: "It is the civil obligation of contracts which it (the Constitution) is designed to reach."

Swayne, J., in Edwards *vs.* Kearzey, 6 Otto, 599, in construing this clause, says: "A contract is an agreement of minds, upon a sufficient consideration, that something specified shall be done or shall not be done." And, referring to the term "obligation," as used in that clause, he defines it to be "the act of obliging or binding; that which,

obligates; the binding power of a vow, promise, oath, or contract."

In Lewis *vs.* Brackenridge, 1 Blackford, 220, Holman, judge, in delivering the opinion of the court, in referring to the term "contract" in the statute upon recognizances, said: "There can be no question but it extends to all rights which are said to arise *ex contractu*, as distinguished from those arising *ex delicto*."

In the case of Henderson and Nashville R. R. *vs.* Dickerson, 67 B. Monroe, 173, the court draws a distinction between the right of property and the right of a plaintiff in a judgment. It uses this language:

"The court holds that the right of property is a vested right, but the right to recover the amount of a judgment is not such a right.

"The views of the plaintiff in error, that by reason of the fact that the law implies an obligation to pay a judgment rendered brings it within the influence of this clause of the Constitution, would upon the same principle require the court to hold that taxes duly assessed, which the law permits to be recovered upon an implied obligation to pay, were also protected by this provision; and yet in The City of Augusta *vs.* North, 57 Maine, 392, the court held that a tax duly assessed is not a debt within the meaning of the clause of the Constitution of the United States prohibiting a State from passing a law impairing the obligation of a contract. But we are not left to speculation upon the views of the courts upon this subject."

The supreme court of New York, in the case of Wyman *vs.* Mitchell, 1 Cowens, 321, says: "No judgment is in any sense a contract or agreement between the parties."

In Todd *vs.* Crumb, 5 McLane, 172, it was held that a judgment is not an agreement, contract, or promise in writing, nor is it in the legal sense a specialty within the meaning of the statute of Ohio.

In the case of Ray *vs.* Hulbert, 17 Ill., 579, the court, in passing upon the right of the defendant to have a set-off allowed under the statute which provides "that in an action brought on *contract* or *agreement*, either express or implied," * * * the defendant might set up a counter-claim and have it allowed upon the bill, and in construing the words "*contract* or *agreement*," as used in the statute, held:

"We can not agree with counsel that a judgment is a contract within the meaning of the statute. It is a conclusion of law upon the rights of the parties. * * * A judgment is no more a contract than a tort."

In Burns *vs.* Simpson, 9 Kansas, 958, the court held "that the term 'contract' did not include a judgment."

The court, *In re* Kennedy, 2 S. C., 226, held "that a judgment in itself was not a contract."

The fullest discussion upon this subject that we have found is in the case of Sproot *vs.* Reid, 3 G. Green, 489. This case presents the question whether a judgment is a contract, under the following state of facts: An execution had been issued for costs in a partition suit, and subsequent to the rendition of the judgment for costs a law had been passed prohibiting sales of real estate under judgments for less than two-thirds of its appraised value. The sale of the land in question was for less than that sum. If the judgment, therefore, was a contract such as contemplated by the constitution, no objection could be taken to the sale; but if otherwise, it was not in compliance with the State statute, and the sale was void. Green, judge, in delivering the opinion of the court, held:

"It is obvious that a judgment is not in fact a contract; it is not an agreement or covenant between two or more persons; it is not a mutual promise upon lawful consideration, creating mutual obligations, either executed or

executory; it is not an agreement between two or more to do or not to do a particular thing. A judgment may be the result of a contract, but it is not the contract itself."

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"True, the relation between a contract and its consequent judgment is very intimate, and still judgments are often rendered when no contract existed. Judgments are rendered for crimes, misdemeanors, and torts, and on mere *ex parte* liability. It can hardly be claimed that such judgments should be regarded as contracts, and yet those judgments have as much force and validity as those growing out of contracts."

* * * * * * *

"But some judgments are more nearly assimilated to contracts than others. Where a judgment is rendered to enforce the obligation of a contract it approximates, but still it is not the same; it does not create this obligation; it only creates the authority under which that obligation is enforced."

* * * * * * *

"True, this judgment creates an obligation, but not such an obligation as comes within the letter or spirit of the constitution. It is an obligation imposed by law, and not the obligation of a contract made by the parties."

Mr. Freeman, in his excellent work on Judgments, clearly entertains this view, as found in section 4, that judgments are not contracts, or in the nature of contracts. In summing up the discussion upon that subject, he says: "It seems, then, that, in order to prove that a judgment is in the nature of a contract, we must supply two of the three essentials, of which two are by implication, and the third by some means not yet discovered."

The same view is held in 3 Albany Law Journal, page 1; 9 Gil., 299; 1 Md. Ch. Dec., 66; 35 Cal., 156.

This question was distinctly presented to the Supreme Court of the State of Georgia in the case of McAfee *vs.* Covington, 71 Ga., 272. The court in that case, in a

very full opinion, in discussing the question of whether a judgment for a tort was a contract within the provision of the Federal Constitution forbidding a State from passing laws impairing the obligations of a contract, without a dissent, held it was not.

In the case of Bidleson *vs.* Whytel, 3 Burr, 1548, it was held that a judgment was not a contract or a promise in writing.

The supreme court of Wisconsin, in the case of Robinson *vs.* Howe, 13 Wis., 341, held that "those rights which the law gives to, or the obligations which it imposes upon, persons in certain relations, independent of any stipulations which the parties themselves have made, are not within the protection of this clause."

The court of appeals of Louisiana, in the case of The State *vs.* The City of New Orleans, 38 La. Ann., 119, held that a judgment for the repayment of money paid by mistake is not upon contract, and is not protected by the Federal constitutional provision prohibiting the enactment of laws impairing the obligation of a contract.

In the case of Slatterlee *vs.* Matthewson, 2 Peters, 380, this question was presented for consideration in an action of ejectment. After the court of appeals of the State had, upon writ of error, pronounced a judgment which virtually settled the title of the parties, but in its order reversing the inferior court, granted a new trial, and subsequently the Legislature, between the date of the decision of the court of appeals and the retrial of the case, passed an act which declared the law in terms directly the reverse of that decided to have been the law of the State by its highest court, the question presented was, Was said act in conflict with the Federal Constitution?

Justice Washington, delivering the unanimous opinion of the court, held that the act was constitutional. In the discussion of the question, he argues that there was

no impairment of a contract between the parties by reason of said act, and that therefore it was not subject to this objection. It did not strike his mind that the fact of the rendition of the judgment by the highest tribunal in the State declaring what the law was that should govern in that particular case was a contract, by reason of its being a judgment, which comes within the influence of the Federal Constitution. And yet it is a well-settled proposition in law that a decision by the highest tribunal of a State in a particular case, although that cause is remanded for a new trial, to be had in accordance with the principles announced, is a final and conclusive determination of the law of the case, so far as decided, and, to that extent, finally and definitely fixes the rights of the litigants.

The reasoning of Mr. Justice Field, in Garrison *vs.* The City of New York, 21 Wall., 203, and of Mr. Justice Miller, in Blunt *vs.* Wingley, 5 Otto, 176, seems to us conclusive upon this question. Justice Field, in referring to the subject, said:

"It may be doubted whether a judgment not founded upon an agreement, express or implied, is a contract within the meaning of the constitutional prohibition. It is sometimes called by text writers a contract of record, because it establishes a legal obligation to pay the amount recovered, and by fiction of law, where there is a legal obligation to pay, a promise to pay is implied."

"It is upon this principle," says Chitty, "that an action in form *ex contractu* will lie on a judgment of a court of record. But it is not perceived how this fiction can convert the result of a proceeding not founded upon an agreement, express or implied, but upon a transaction wanting the assent of the parties into a contract within the meaning of the clause of the Federal Constitution which forbids any legislation impairing its obligation. The purpose of the constitutional prohibition was the maintenance of good faith in the stipulations of parties against any State

interference. If no assent be given to a transaction, no faith is pledged in respect to it; and there would seem in such case to be no room for the operation of the prohibition. In the proceeding to condemn the property of the plaintiff for a public street there was nothing in the nature of a contract between him and the city. The State, in virtue of her right of eminent domain, had authorized the city to take his property for a public purpose upon making to him a just compensation. All that the Constitution or justice required was that a just compensation should be made to him, and his property would then be taken, whether or not he assented to the measure."

Justice Miller, in alluding to the same subject, reasoned the question as follows:

"The proposition of the plaintiff in error is that when he recovered the judgment against the defendant he had a right to exact and receive in payment of that judgment gold and silver coin or the legal-tender treasury-notes of the United States, and that defendant had no right to pay him anything else; that the judgment was a contract, and the obligation of it is impaired by the statute which authorizes payment in something else. It is undoubtedly true in some sense and for some purposes that a judgment has been treated and considered as a contract; and we are not disposed to deny that the judgment in this case is evidence of a contract, but the judgment is only a contract, because it is evidence of a debt or obligation on the part of the defendant due to plaintiff. The judgment itself presupposes, and is founded upon some antecedent obligation or contract, and it is only a higher evidence of that contract, because it now has the sanction of the judicial determination of its validity and amount by a court of law. The essential nature and character of the contract remains unchanged, and in deciding how far it may be affected by legislation, we must look mainly to the original contract."

We conclude from these authorities that a judgment is not in fact or in law a contract protected by the tenth

section of the first article of the Constitution of the United States.

The Supreme Court, in the case of Calder and Wife *vs.* Bull and Wife, 3 Dallas, 386, in effect has passed upon this question. On the 21st of March, 1793, the court of probate for Hartford County disapproved of the will of N. Morrison, and refused to record it. No appeal was taken from that decree in eighteen months, and by that neglect, under the statute of Connecticut, the right of appeal was barred. It was a final judgment, and the rights of property under the statute had fully attached, when in May, 1795, the Legislature of Connecticut passed a resolution or law setting aside the decree and granting a new hearing by the same court of probate, with the right of appeal in six months.

A new trial took place, the will was approved and allowed to be recorded, an appeal to the supreme court of the State was taken, and on appeal from that court to the court of errors of Connecticut, in each of which it was adjudged that there was no error. An appeal was then taken to the Supreme Court of the United States, where the court affirmed said judgment. In the decision of that case by Justice Chase it was not even seriously considered that, by reason of the fact that the judgment had been entered which confirmed the descent in the heirs of Morrison, it was protected by that clause of the Constitution. The court, in discussing this question, 3 Dallas, 394, held:

"If any one has a right to property, such right is a perfect and exclusive right; but no one can have such right before he has acquired a better right to the property than any other person in the world. A right, therefore, to recover property can not be called a perfect and exclusive right. I can not agree that a right to property vested in Calder and wife in consequence of the decree (of the 21st of March, 1783) disapproving of the will of Morrison, the

grandson. If the will was valid, Mrs. Calder could have no right as heiress of Morrison, the physician; but if the will was set aside, she had an undoubted title.

"The resolution (or law) alone had no manner of effect on any right whatever vested in Calder and wife. The resolution (or law) combined with the new hearing, and the decision in virtue of it took away their right to recover the property in question. But when combined they took away no right of property vested in Calder and wife, because the decree against the will (21st of March, 1783) did not vest in or transfer any property to them."

In summing up the conclusion, on page 400, Justice Patterson held:

"If the act of the Legislature of Connecticut was a judicial act, it is not within the words of the Constitution; and, second, even if it was a legislative act, it is not within the meaning of the prohibition."

This decision is in full accord with the case of Henderson and Nashville R. R. *vs.* Dickerson, hereinbefore cited.

There is no middle ground that can be taken by the court upon this question. If it departs from the views that have heretofore been held, and shall hold that a judgment is a contract, and not simply the evidence of one which is protected by the tenth section of the first article, and that it is a contract coming within the influence of that clause, every judgment for costs, for a penalty, for a tort, or for a fine will necessarily be brought within the protection of such a decision. Such could not have been, in view of the public history of the country, the purpose and intention of the framers of that instrument when they incorporated that provision in it. We confidently submit that such a construction will not be given to it by this tribunal.

The second question presented by the record, to wit, is section 35, of article 8, of the constitution of West Virginia repugnant to the first section of the fourteenth amendment of the Constitution of the United States, which provides "nor shall any State deprive any person of life, liberty, or property without due process of law"?

This question is conclusively answered by the provision contained in section 35. It provides: "The Legislature shall provide by general law for giving full force and effect to this section by due process of law." It is clear, from this provision, that there exists no conflict between the State and Federal Constitution. Its framers assumed that the plaintiff in error had such a right or interest in the judgment obtained, from the fact of its existence alone, that would render it unjust and inequitable to deprive him of that interest or right, except upon full hearing and due consideration by a judicial tribunal to ascertain the *fact* whether his claim against the defendant in error rested upon the principle that the damages assessed in his favor was "for acts done according to the usages of civilized warfare" in the prosecution of said war, which, under the universal rules governing public war, give no remedy against the individual for the act done; or whether it rested upon facts which, under the universal rules applicable to an individual trespass upon the rights of others, was the subject of a common-law action. The section is predicated upon the theory that the late civil war was a public war, governed by the rules applicable to such a condition of things; that the rights of belligerents were recognized by the political department of the Federal Government as belonging to those in rebellion, and that such had been the concurrent views of the highest judicial tribunal of the Union; that at the time the act charged in the declaration was done it was not a private wrong for which there was a remedy against the individual. The

fact that the supposed injury was merged in the judgment did not deprive the people, acting in their sovereign capacity, from granting immunity and relief to the citizen, assuming, as they did, that it was not repugnant to any provision in the Federal Constitution, they having provided that the facts necessary to support a case within its provisions were to be judicially ascertained through the ordinary and usual channels of the court. If, as we have suggested, such a judgment is not a contract protected by the Federal Constitution, there certainly can be no limitation contained in the first section of the fourteenth amendment upon the right of the people to incorporate into their organic law additional grounds of equity jurisdiction to that which all courts of equity have to set aside a judgment rendered through fraud, accident, or mistake. This provision, being self-executing, needed no legislation to put in full operation the powers of a court of equity. The "law of the land" was broad enough without any legislative enactments to give full relief in accordance with its benign provisions.

Under the law of the State of West Virginia all judgments are liens upon the real estate of the judgment debtor until paid, barred by limitations, set aside or annulled by the judgment of a competent court. If such a judgment was not declared void, a cloud would rest upon the title of the judgment debtor, notwithstanding its invalidity, and the title will be defective until annulled by judicial process. This gives to a court of equity, under its general jurisdiction, the right to pass upon that question, and, if the judgment is invalid, to so decree that the cloud resting upon the title may be removed. Such were the proceedings adopted in this case. Can it be seriously contended before this court that where a party files a bill in equity, summons the defendant before the chancellor, who appears by counsel, demurs and answers the bill, takes

depositions in the case, argues the legal questions and facts involved, and a final decree is rendered upon the merits, with right of appeal for error committed by the inferior court, that the proceeding has been without "due process of law"?

Mr. Webster, in the Dartmouth College case, gives this definition of that term. He said: "By the law of the land is most clearly intended a general law—a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial.

Edwards, judge, in Westervelt *vs.* Gregg, 12 N. Y., 209, said:

"Due process of law undoubtedly means in the due course of legal proceedings, according to those rules and forms which have been established for the protection of private rights."

Selden, judge, in the case of Wynehamer *vs.* The People, 13 N. Y., 432, concludes an elaborate discussion of this question in the following language:

"Hence, both the courts and commentators in this country have held that these clauses, in either form, secure to every citizen a judicial trial before he can be deprived of life, liberty, or property."

2 Kent., 13.

2 Story's Commentaries on Constitution, article 1783.

Murray *vs.* Hoboken, 18 Howard, 272; 19 Wall., 122.

Taylor *vs.* Porter, 4 Hill, 146.

It does not necessarily import a jury trial, even at law (1 Abbott, 317), but also includes summary remedies. (Martin *vs.* Mott, 12 Wheaton, 19; U. S. *vs.* Ferreira, 13 Howard, 40; Murray *vs.* Hoboken, 18 Howard, 272.)

The definition given of this term by Judge Story, in Huber *vs.* Riley, 53 Pa. St., 117, brings the proceedings in this case in every way within its extent and terms. He says:

"It ordinarily implies and includes a complainant, a defendant, and a judge, the regular allegations, answer, and the trial according to some settled course of judicial proceeding."

"It must be admitted that there are exceptional cases. Prominent among these are summary proceedings to recover debts due to the Government, special taxes, and sums due by defaulting public officers."

We feel satisfied that the court will have no difficulty in coming to the conclusion that the thirty-fifth section of article 8 of the constitution of West Virginia is not repugnant to the first section of the fourteenth amendment. Both require that the fact upon which the relief rests shall be ascertained by "due process of law."

We feel equally confident that the record in this case, as presented to the court for its consideration, shows that the relief granted by the State courts was, according to the provisions of both constitutions, by "due process of law."

These being the only two Federal questions involved in the record, we submit that the decree of the supreme court of West Virginia affirming the decree of the circuit court of Preston County should be affirmed.

CHAS. J. FAULKNER,
Counsel for Defendant in Error.